MISSISSIPPI LAW JOURNAL

1965-66 MISSISSIPPI SUPREME COURT TERM—
SOME SIGNIFICANT CASES
John R. Bradley, Jr., E. Clifton Hodge, Jr.,
and *William M. Rainey*

ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE
TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED"
DUE PROCESS—PART II
Parham H. Williams, Jr.

The After-Acquired Title Doctrine and Mineral Conveyances
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1965-66 MISSISSIPPI SUPREME COURT TERM— SOME SIGNIFICANT CASES

*John R. Bradley, Jr.,** *E. Clifton Hodge, Jr.,*** and *William M. Rainey****

As a preliminary step in implementing the plan of the *Mississippi Law Journal* to include in its future December issues a definitive study of the preceding court term's significant cases, we experimented in methods of (a) selecting important cases, (b) testing them for their significance to lawyers, judges, businessmen, the legislature, state and local governments, and others, and (c) commenting on the cases to indicate new or modified rules, future problems, and possible solutions. Much of the work was like the hours of searching for a nonexistent lien instrument or controlling case.

The intention is not to publish a 200 page article which few will read. The problem is not finding enough cases for the commentary, but paring the final selections and the piece so its length will not alienate busy lawyers and judges. At the same time, we want the article complete enough to be helpful. The task is difficult, and this year's article does not pose as a standard. It does not even include all the cases it should. But this is the beginning of a project we think will grow and produce one of the most useful publications for the Mississippi bench and bar.

I. Attorneys

An attorney's withdrawal of pleadings because his fee had not been paid was criticized by a decision[1] which protected the client who was put in default by the withdrawal. On the day before trial, the appellant's attorney warned the appellant by letter that unless he was paid the other side would win. Having received no money from his client, the attorney appeared when the case was called, reported the nonpayment, announced his withdrawal as counsel, and withdrew all

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[1]Fairchild v. General Motors Acceptance Corp., 179 So. 2d 185 (Miss. 1965).

the pleadings he had filed. The appellant, not being present in court, was declared in default and a judgment entered for the appellee. Later in the term the appellant, by another attorney, made a motion to have the default judgment set aside. The motion was overruled. The supreme court reversed the trial court. Counsel should withdraw from his client's case only after reasonable notice and then only with the permission of the court; however, any pleadings which had been filed remained part of the court records and were not subject to withdrawal by the attorney.

Two problems are interwined: the withdrawal of the attorney without reasonable notice to his client and without the court's permission; and the withdrawal of pleadings filed by the attorney. The court reprimanded the withdrawal without reasonable notice to the client and without the court's permission, citing Rule 44 of the Rules of Professional Conduct of the Mississippi State Bar.[2] Rule 44 requires not only giving "due notice," but also allowing the client time to employ another lawyer. In this case, neither requirement was met, and the client's rights were seriously jeopardized. Fortunately, the supreme court is intent on imposing the highest standards of professional conduct upon the bar.[3]

It has been held that the client has no right to require an attorney to obtain the court's permission before withdrawing.[4] The reason for obtaining the permission of the court is to avoid the possibility of the adverse party's continuing to serve papers on the withdrawn attorney.[5] The *Fairchild* decision seems to make the court's permission a prerequisite to withdrawal. The problem of an attorney's withdrawing his services and his pleadings, thus allowing a default judgment against his client, has not arisen in many reported cases. In the few states where the issue has been raised, the rule is that the pleadings remain an official record preventing a default judgment.[6] The rule is firmly established in Mississippi that the filing of a responsive pleading precludes entry of a default judgment.[7]

II. Conflicts of Laws

A Mississippi creditor attached two commercial trailers belonging to a Missouri based cooperative while the vehicles were transitorily in

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[2]33 Miss. L.J. 461 (1962).

[3]See Annot., 45 A.L.R. 1145 (1926), for a complete listing of cases discussing the right of an attorney to withdraw for failure to receive fees.

[4]Bostock v. Brown, 198 Wash. 288, 88 P.2d 445 (1939); Powers v. Manning, 154 Mass. 370, 28 N.E. 290 (1891).

[5]Bostock v. Brown, 198 Wash. 288, 88 P.2d 445 (1939).

[6]*E.g.*, English v. Smith, 71 Wyo. 1, 253 P.2d 857 (1953).

[7]*E.g.*, Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938).

the state. The attachment was attacked by the conditional vendor, a Michigan company, on the grounds that the conditional sales contract gave it a prior lien. The vendor also argued that since the execution of the contract and the delivery of the goods took place in Tennessee, where no recording was required, that state's law on priority should apply. The creditor said the law of the situs of the trailors applied. This was Missouri, which required recording conditional sales contracts. The vendor had not recorded the contract in any state. In ruling for the vendor, the court held that Tennessee law (lex loci contractus) governed the priority and that the Missouri recording statute (lex loci situs) was without extraterritorial effect.[8]

Title reserved in the conditional vendor, valid under the law of the state in which the contract was made and the property then located, will be preserved against creditors of the vendee whose rights attach after the property has been removed from the contract state.[9] In the absence of a statute requiring it, conditional sales contracts do not have to be recorded to be valid against third persons,[10] but if a statute requires filing or recording, failure to comply with the statute makes the reservation of title invalid as to persons protected by the statute.[11] The applicable recording statute for conditional sales contracts is the state of the situs of the chattel or where the contracting parties expect the property to be located,[12] although sometimes the statute may not have extraterritorial effect. If the law of the situs state requires recording, failure to record usually renders the contract invalid as against most creditors.[13] There is, however, other authority that when the lex loci contractus protects the nonrecording vendor and, after execution of the contract the chattel is removed to another state, the nonrecording vendor is still protected.[14] The lex loci contractus rule is but one of the rules applied in deciding the validity of a contract.[15] The lex loci contractus usually governs the construction, operation, and effect of a conditional sales contract.[16]

The court followed established precedent[17] in its application of the lex loci contractus rule. Since Tennessee had no recording statute at the execution of the contract, presumably the court followed the common

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[8]Clark Equip. Co. v. Poultry Packers, Inc., 181 So. 2d 908 (Miss. 1966).
[9]See Annot., 25 A.L.R. 1155 (1923).
[10]See 78 C.J.S. *Sales* § 577 (1952).
[11]Mize v. Paschal, 206 Ga. 189, 56 S.E.2d 266 (1949).
[12]See 78 C.J.S. *Sales* § 578(a) (1952).
[13]*Ibid.*
[14]*Ibid.*
[15]Strumberg, Conflict of Laws 226 (3d ed. 1963).
[16]11 Am. Jur. *Conflict of Laws* § 77 (1937).
[17]Mid-Continent Fin. Corp. v. Grant, 213 Miss. 789, 58 So. 2d 1 (1952).

law rule mentioned above which protects a vendor. The effect of the statute[18] requiring liens executed out of the state to be recorded in Mississippi when the property is moved to this state was negated. A transitory trip with the trailors into the state was deemed not within the statutory requirements of removal to the state. Mississippi's recently enacted Uniform Commercial Code section 1-105[19] may have some effect on later decisions in this area.[20]

III. Courts

A. Extension of the Term

One decision[21] may be more of a lesson to judges than to lawyers. The trial court entered a $3,000 judgment for the plaintiff. During the term, a motion to correct the judgment was filed. No action had been taken on the motion, and on the last day of the term, the court entered an order to "adjourn" until the next Monday but did not specifically extend the term. During the attempted extension, an order was entered correcting the judgment. On appeal, the defendant contended that the judgment was a nullity, having been corrected in vacation. The plaintiff supplemented the record on appeal by showing a court order, entered more than a year later, correcting the minutes and specifically extending the term. The supreme court reversed this action. Orders extending a term of court must specifically state the extension, and a nunc pro tunc order entered over a year later cannot extend an earlier term. The dissent agreed that the order in the minutes did not meet the statutory requirement[22] but thought the clear intention of the trial court to extend the term should be enough, especially when no one was misled or had his rights prejudiced by the "extension."

The effect of the decision on judgments handled after the expiration of the term has been discussed in the *Mississippi Law Journal*.[23] Remarks here would be largely repetitious. The oddity of the result is that the victorious appellant cannot expect any relief, except the delay. As noted by the four dissenters, the case will be returned to the trial court; the judgment will be corrected as before; and the case will be appealed on its merits. Other judgments entered during the two week attempted extension were likewise nullified.

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[18]Miss. Code Ann. § 870 (1956).

[19]Miss. Laws 1966, H.B. 2, advance sheet No. 8.

[20]See 37 Miss. L.J. 478 (1966) for a thorough discussion of this case.

[21]McDaniel Bros. Constr. Co. v. Jordy, 183 So. 2d 501 (Miss. 1966).

[22]Miss. Code Ann. § 1647 (1956).

[23]37 Miss. L.J. 491 (1966).

B. Recuse

Before being convicted the defendant requested the trial judge to recuse himself because he was related to the sole prosecuting witness, who had an interest in the outcome of the case. The judge, a first cousin of the prosecuting witness, overruled the motion. In reversing the conviction, the court admonished trial judges to go to great lengths to avoid appearances of favoritism, and if there is a reasonable doubt, the judge should withdraw.[24]

The general rule at common law was that a judge was not disqualified by relationship to a party.[25] At the present time, however, nearly all jurisdictions disqualify a judge who is related to one of the parties within specified degrees of consanguinity or affinity.[26] Even in states lacking statutory or constitutional provisions for recusion, it has been held that disqualification is called for where a party is closely related to the judge.[27] The disqualifying relationship usually must be to a party, thus excluding court officials[28] and sometimes attorneys.[29] If the constitution or statute does not provide guidance on the degree of relationship, in some cases the rule has been set at either the fourth degree of consanguity or affinity,[30] or so near as to evidence partiality.[31] The interpretation of "party," usually found in the disqualification statutes, has been confused. The extremes of interpretation extend from only a party to the record to any one represented by the parties to the record.[32]

Mississippi has both a constitutional[33] and statutory[34] restriction on judges. One of the earlier cases[35] dealing with these limitations on judges disqualified a chancellor from a bank receivership proceeding in which his wife was, as a depositor in the bank, a party. A criminal case[36] denied that there was the proscribed affinity when the step-mother of the prosecutrix in a rape case was the judge's aunt. The broader policy stated in that case was a lack of affinity between the blood

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[24]Black v. State, 187 So. 2d 815 (Miss. 1966).

[25]*E.g.*, McKenzie v. Hixon, 201 Ala. 413, 78 So. 791 (1918).

[26]See 30A Am. Jur. *Judges* § 142 (1958).

[27]Hill v. Kesselring, 310 Ky. 483, 200 S.W.2d 858 (1949).

[28]30A Am. Jur. *Judges* § 143 (1958).

[29]See Annot., 50 A.L.R.2d 153 (1956). *Contra,* Annot., 50 A.L.R.2d 156 (1956).

[30]30A Am. Jur. *Judges* § 145 (1958).

[31]*Ibid.*

[32]See Annot., 10 A.L.R.2d 1325 (1950).

[33]Miss. Const. art. 6, § 165.

[34]Miss. Code Ann. § 1651 (1956).

[35]Dodd v. Kelley, 107 Miss. 471, 65 So. 561 (1914).

[36]McLendon v. State, 187 Miss. 247, 191 So. 821 (1939).

relations of a husband and the blood relations of the wife. It has also been held[37] that a justice of the peace should have recused himself when his first cousin was president of a corporate party. These three cases fail to disclose the degree of consanguinity or affinity necessary to compel a judge to recuse himself. The Mississippi Supreme Court could adopt some specific standards to guide the trial judges. In the principal case, the related "party" was the prosecuting witness, and the court said this combination (first cousin and sole prosecuting witness) should force the judge to recuse himself. Since there have been insufficient cases to define adequately a "party," a comprehensive definition would be helpful. If the judge's son represents the plaintiff for a contingent fee, the judge should recuse himself.[38] But the judge could preside when his first cousin, retained on a contingent fee, was defense counsel.[39] The question of relationship between judge and attorney was clarified in *Shireman v. Wildberger*[40] by a rule that mere relationship to an attorney was of no consequence; the attorney had to have some interest in the subject matter of the suit.

It is not enough that the judge believe that he is unbiased, but the trial circumstances must be such that a litigant could have no reasonable belief that the judge's relationship to one involved in the case would affect his decisions. The reasonable doubt standard is better than no guide, but surely a carefully prepared, comprehensive set of rules would be welcomed by the judges and lawyers.

IV. Criminal Law

A. Defining "Time of Arrest" To Decide Whether Evidence Was Obtained Legally

In the case of *Gearing v. State*,[41] to decide whether the evidence uncovered in a search was obtained legally, the court had to decide first when the arrest was made. The defendants were spotted in a car of the same description given by an attendant at a store which had been robbed. An officer stopped the car and informed the defendants that they would have to go with him for identification. The officer put one of the defendants in the police car and asked the other to drive the car in which the defendants had been riding. On the way to the police station, the defendant who was driving the car attempted to escape and had a wreck. An investigation of the wrecked automobile

[37]Cashin v. Murphy, 138 Miss. 853, 103 So. 787 (1925).

[38]Yazoo & Miss. V. R.R. v. Kirk, 102 Miss. 41, 58 So. 710 (1912).

[39]Norwick Union Fire Ins. Co. v. Standard Drug Co., 121 Miss. 510, 83 So. 676 (1920).

[40]125 Miss. 499, 87 So. 657 (1921).

[41]185 So. 2d 652 (Miss. 1966).

and surrounding area enabled the officers to find a pistol and some money in a brown paper sack. The officer who originally confronted the defendants admitted at the trial that the first time the defendants were *verbally* placed under arrest was after the accident. The court held that the defendants were already under arrest at the time the search was made, causing the evidence obtained from the search to be admissible.

If the arrest is legal, the search is legal;[42] if the arrest is unlawful, the search is unlawful.[43] So in some instances the admissibility of the fruits of the search depends on whether the defendant had been arrested before the search was made. In upholding the conviction, the court said that an arrest occurs when the person arrested understands that he is in the power of the one arresting and submits in consequence.

The latter part of section 2470 of the Mississippi Code says that "in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit." The court did not explain the effect of this statute in defining the time of arrest, but a strict construction of section 2470 would probably necessitate a holding of no legal arrest until the accused had been informed of the object and cause of the arrest.

The rule in Mississippi has been that an officer making an arrest can search the accused for the purpose of obtaining any evidence of the crime for which he was arrested.[44] He may take any property which the accused may unlawfully possess or anything which could be used in making an escape.[45] The authority to arrest usually carries with it the authority of the officer to search the person and automobile of the accused.[46] The search which is an incident to arrest is a limited search and extends only to the " 'immediate presence' of the prisoner, the possessions in his 'immediate control' and in his 'immediate surroundings.' "[47]

The 1965 Mississippi case of *Fondren v. State*[48] seems inconsistent with this rule stated in *Gearing*. In the *Fondren* decision, the court held that the arrest occurred only after there had been a taking of possession by "manual caption." Although "manual caption" is a vague test, it is surely not the same as requiring the accused to understand

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[42]Smith v. State, 228 Miss. 476, 87 So. 2d 917 (1956). See generally 79 C.J.S. *Searches and Seizures* § 68 (1952).

[43]Coston v. State, 252 Miss. 257, 172 So. 2d 764 (1965); Lewis v. State, 198 Miss. 767, 23 So. 2d 401 (1945).

[44]*E.g.*, Toliver v. State, 133 Miss. 789, 98 So. 342 (1923).

[45]*Ibid.*

[46]Thompson v. State, 153 Miss. 593, 121 So. 275 (1929).

[47]Smith v. State, 240 Miss. 738, 742-43, 128 So. 2d 857, 859 (1961).

[48]253 Miss. 241, 175 So. 2d 628 (1965).

that he is in the power of the one arresting and to submit in consequence.

An examination of the *Fondren* and *Gearing* cases and section 2470 of the code indicates a need for a more explicit rule defining the time of arrest. This is not easily done, however, and the rule probably will be derived only after more decisions on the question. A verbal declaration of arrest by the arresting officer is a useful criterion but should not be mandatory. Requiring some overt action by the arresting officer may help, but again only emphasizes the problem of stating a comprehensive rule, a task the court wisely avoided at this time.

B. Exclusion of Women from Jury Service

The validity of the state statute excluding women from jury service is the issue in *State v. Hall.*[49] The lower court quashed the indictment against the defendant on the ground that exclusion of women from jury service by a state law[50] violated the equal protection clause of the fourteenth amendment of the United States Constitution. The lower court was reversed by a decision that the statute was constitutional and any change in this requirement for jury service will have to come from the legislature. The court stated that there is no absolute right of a citizen to serve on a jury and that the legislature had a right to exclude women from jury service. After quoting at length from several United States Supreme Court decisions, Justice Jones, for the majority, concluded that the federal courts and Congress considered the fourteenth amendment as not giving women the absolute right to serve on juries. Chief Justice Ethridge dissented, saying that the exclusion of women constituted an "arbitrary and unreasonable" act which violates due process and equal protection of the laws.

There have been many cases upholding the partial exclusion of women from jury service,[51] but the case of *White v. Crook,*[52] decided by a federal district court in Alabama, is the only decision other than *Hall* on the constitutional validity of the complete exclusion.[53] In *Crook,* it was decided that the equal protection clause had been violated by complete exclusion. The Mississippi court did not feel bound by the *Crook* decision, so there was no attempt to distinguish the cases. One difference, but perhaps not enough for a legal distinction, is that the

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[49]187 So. 2d 861 (Miss. 1966).

[50]MISS. CODE ANN. § 1762 (1956).

[51]See Annot., 157 A.L.R. 461 (1945).

[52]251 F. Supp. 401 (M.D. Ala. 1966).

[53]In the *Crook* case, the judge stated that "the courts have not heretofore been called on to decide a case presenting the constitutional validity of a state's complete exclusion of women from service as jurors." White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966).

challenge in *Crook* was by the women who claimed a right to serve as jurors, and in *Hall* the challenge was by a female defendant who claimed her right to a fair trial was denied by the systematic exclusion of women. In *Crook,* the court used this distinction to bolster the disregard of previous cases on the partial exclusion of women.

In dissent, Chief Justice Ethridge pointed out that only Mississippi and South Carolina completely exclude women from juries. This case is on its way to the United States Supreme Court, so the decision may be reversed. If not, there will probably be an appeal to the legislature.

C. Intelligent Waiver of Right to Counsel

In *Thompson v. State,*[54] the question was the admissibility of statements made without the aid of counsel. The defendant was brought in for questioning and the sheriff immediately advised her that any statement she made could be used against her in court and that she had a right to counsel. The defendant replied that she would not mind making a statement at that time, and the ensuing interrogation lasted approximately thirty minutes. On appeal from her conviction, the defendant contended that her statements were not admissible because she did not have the aid of counsel. The court upheld the conviction by finding that the defendant had "intelligently and competently" waived the right to have counsel at this original interrogation.

The United States Supreme Court first held that the aid of counsel was necessary at the original interrogation in *Escobedo v. Illinois.*[55] In *Escobedo,* it was held that a suspect has a right to counsel when the investigation has begun to focus on him in particular and he has requested the assistance of counsel. It has been decided that a confession in violation of *Escobedo* ordinarily requires reversal regardless of the evidence of guilt.[56] The Mississippi court cited the *Escobedo* decision and said the defendant in *Thompson* was entitled to counsel at the interrogation.

Although the majority rule seems to be that a request for counsel is not a prerequisite for the right to counsel at the interrogation stage,[57] there is authority to the contrary.[58] The Mississippi court followed the majority view by holding in the *Thompson* case that the defendant was entitled to an attorney even though she had not specifically requested one. However, as indicated above, some courts have taken the view

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[54]186 So. 2d 747 (Miss. 1966).

[55]378 U.S. 478 (1964).

[56]People v. Furnish, 63 Cal. 2d 511, 407 P.2d 299, 47 Cal. Rptr. 378 (1965).

[57]*E.g.,* United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965).

[58]*E.g.,* Neuenfeldt v. State, 29 Wis. 2d 20, 138 N.W.2d 252 (1965).

that failure to request a lawyer causes the *Escobedo* decision to be inapplicable.[59]

In determining whether there has been an intelligent waiver of counsel, the court should examine the suspect's awareness of the crime with which he is charged, the possible punishment for it, and all other pertinent facts.[60] It is generally held that silence will not constitute a waiver.[61] The court must insist on an *intelligent* waiver of counsel, for a failure to do so will discriminate against the ignorant and inexperienced who cannot understand the consequences of not having an attorney and may lead to abandonment of the presently recognized right of intelligent waiver.

In June 1966, the United States Supreme Court rendered another decision on the rights of an accused at the preliminary interrogation. This decision, *Miranda v. Arizona,*[62] went beyond *Escobedo* and set the rule that an accused cannot be questioned after he has shown a desire to have an attorney or after he has indicated that he does not wish to be interrogated. The majority opinion, which contains a lengthy discussion of the preliminary interrogation, actually supplements the *Escobedo* guidelines, rather than establishing a completely new method of conducting these interrogations.

The *Miranda* case probably has no effect on the decision of the Mississippi Supreme Court in *Thompson v. State,* for Mr. Chief Justice Warren said for the majority in *Miranda* that "the defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently."[63] Although the *Thompson* case puts some light on this problem in Mississippi, we must await a more detailed explanation of intelligent waiver and hope for a responsible use of this exception to the right of counsel rule.

D. Use of Habeas Corpus in State Court

In *Allred v. State*[64] the defendant had initiated a habeas corpus proceeding in the circuit court asking to be released because he had been without counsel when he was arraigned and when he pled gulity. The circuit judge in the habeas corpus proceeding granted the defendant a new trial because of a violation of his federal and state constitutional rights to have counsel furnished. The defendant then asked for a rehearing and discharge on the grounds that the indictment

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[59] *E.g.*, United States v. Childress, 347 F.2d 448 (7th Cir. 1965).

[60] Commonwealth v. Russell, 206 Pa. Super. 436, 213 A.2d 100 (1965).

[61] *E.g., In re* Huard, 125 Vt. 189, 212 A.2d 640 (1965).

[62] 86 Sup. Ct. 1602 (1966).

[63] *Id.* at 1612.

[64] 187 So. 2d 28 (Miss. 1966).

was void because he did not have the aid of counsel at the preliminary hearing. This motion for a rehearing was overruled and the defendant appealed. The court had two main questions: whether the writ of habeas corpus was the correct remedy; and whether the defendant should have been acquitted or retried because of the state's failure to provide counsel for him.

In Mississippi a defendant must appeal to test the sufficiency of his conviction. Habeas corpus does not serve this function.[65] This view of habeas corpus is contrary to the trends of federal use of this writ.[66] The United States Supreme Court has held that the writ will lie when the conviction has been obtained in violation of the constitutional rights of the accused and when the writ is the only effective means of preserving one's rights.[67] The court pointed out in the *Allred* case that the defendant could not appeal from a plea of guilty,[68] so with elimination of the remedies of habeas corpus and appeal, the court said the writ of coram nobis was the only remedy available to the defendant.

The writ of error coram nobis is a common law remedy to correct errors of fact which were unknown at the time of trial to the party seeking relief,[69] and it cannot be employed where there are other adequate remedies available.[70] In a case with essentially the same problem as *Allred,* the court discussed in detail the reasons for making coram nobis the post-conviction remedy.[71] The writ of habeas corpus is confined to its historical use where the only questions are whether there was jurisdiction to enter judgment and whether the judgment authorized a detention of the prisoner.[72] It should now be clear that because habeas corpus cannot be used to test the sufficiency of a defendant's conviction in Mississippi, when a defendant desires to contest his conviction and he cannot appeal, the writ of coram nobis is the remedy. The court said the bar had become confused about the scope and purpose of the habeas corpus proceeding. The *Allred* decision should remove this confusion.

The second question was whether the defendant should be acquitted or tried again. The court pointed out that the many acquittals obtained in federal cases when an indigent defendant had been deprived of counsel were limited to cases in which the prosecution took advantage of the defendant's lack of counsel. In *Allred,* since there was no evidence

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[65]See *Ex parte* Grubbs, 79 Miss. 358, 30 So. 708 (1901).
[66]See WRIGHT, FEDERAL COURTS § 53 (1963).
[67]Waley v. Johnston, 316 U.S. 101 (1942).
[68]MISS. CODE ANN. § 1150 (1956).
[69]Rogers v. Jones, 240 Miss. 610, 128 So. 2d 547 (1961).
[70]Bennett v. State, 106 Miss. 103, 63 So. 339 (1913).
[71]Rogers v. Jones, 240 Miss. 610, 128 So. 2d 547 (1961).
[72]*Ibid.*

that the prosecution took advantage of the defendant, he was entitled to a new trial, not acquittal. In a prior decision, the court held that the only circumstances in which an indigent defendant could be acquitted was where a confession had been obtained during the time he was held or where there were fruits of an illegal detention.[73]

E. Probable Cause Necessary for Issuing a Search Warrant

The decision in *O'Bean v. State*[74] is a new lesson in the use, in criminal prosecution, of evidence obtained by search and seizure. The adoption of a new rule came after a review of earlier decisions on the quantum of probable cause necessary for the issuance of a search warrant.

Since *Mai v. State*[75] was decided in 1928, the rule in Mississippi has been that a decision by a magistrate to issue a search warrant is a conclusive judicial finding of probable cause. In *Mai* the court reasoned that to allow an attack on the validity of the judicial finding of the magistrate who issued the warrant would be to open a collateral issue. The *Mai* rule was consistently followed prior to the *O'Bean* case,[76] but it was subjected to criticism in the dissenting opinion in *Armstrong v. State*.[77] In that case Justice Anderson pointed out that the rule allowing the unilateral decision of the magistrate to be res judicata on probable cause would condone the worst motives of the issuing magistrate. He suggested that the question of probable cause should be open to review by the appellate court.

Although the court had followed the rule that the decision of the magistrate was conclusive as to probable cause, it occasionally set guidelines for the magistrate. A warrant could be issued only upon evidence which would be competent in a jury trial and which would cause a reasonable man to believe that the offense had been committed.[78] The court had also construed the search and seizure provisions strictly against the state and in favor of the citizen.[79]

The *O'Bean* decision specifically acknowledges that federal rules on searches and seizures are applicable to the state.[80] To find the federal

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[73]Galbraith v. State, 184 So. 2d 633 (Miss. 1966).

[74]184 So. 2d 635 (Miss. 1966).

[75]152 Miss. 225, 119 So. 177 (1928).

[76]Goss v. State, 187 Miss. 72, 192 So. 447 (1939); Sykes v. State, 157 Miss. 600, 128 So. 753 (1930); Hendricks v. State, 144 Miss. 87, 109 So. 263 (1926); Loeb v. State, 133 Miss. 883, 98 So. 449 (1923).

[77]195 Miss. 300, 15 So. 2d 438 (1943).

[78]Elardo v. State, 164 Miss. 628, 145 So. 615 (1933).

[79]Falkner v. State, 134 Miss. 253, 98 So. 691 (1924).

[80]Mapp v. Ohio, 367 U.S. 643 (1961).

rule on probable cause for issuing a search warrant, the court relied primarily on the 1964 Supreme Court decision of *Aguilar v. Texas*.[81] The *Aguilar* standard requires that the affidavit seeking a search warrant "must contain some of the underlying facts or circumstances from which a detached and neutral judge can fairly ascertain that probable cause does exist for the issuance of the warrant."[82] The affidavit used to obtain the search warrant against the defendant in *O'Bean* did not meet the standard required by the fourth amendment as defined in *Aguilar*, because of its failure to allege facts from which the magistrate could judicially determine probable cause.

The *O'Bean* opinion is not a manual of the procedure to be used now, but the new rule is probably clear enough, especially when viewed as part of the criminal procedure overhaul. Issuance of a search warrant simply will be a more carefully executed procedure instead of a coarse formality immune from appellate review.[83]

F. Reopening a Case after Submission to the Jury

The court took the opportunity in *Perkins v. State*[84] to explain the reopening of a criminal case which has already gone to the jury. The defendant was charged with assault and battery with intent to kill. After retiring, the jury asked and was allowed to examine the scars on the prosecuting witness. Then the jury retired again and found the defendant guilty.

Reopening a case after submission to the jury is within the judicial discretion of the trial judge,[85] and in this instance the court said the discretion had been abused. In criticizing the actions of the trial court, Justice Smith sketched the correct procedure for reopening. First is an application to reopen. For the application to be granted, there must be some good cause to reopen, and the application must be within a reasonable time after both sides have rested and closed. The court reporter should be present, and the opposing counsel must have ample opportunity to cross-examine. Reopening usually is by consent of the parties, or to put into evidence some non-controverted matter essential

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[81]378 U.S. 108 (1964).

[82]O'Bean v. State, 184 So. 2d 635, 638 (Miss. 1966).

[83]For a detailed examination of the *O'Bean* case and the validity of search warrants see Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process (Part I)*, 37 Miss. L.J. 353 (1966).

[84]253 Miss 652, 178 So.2d 694 (1965).

[85]23 C.J.S. *Criminal Law* § 1056 (1952).

to a complete record.[86] If the application is opposed, the trial judge must make certain that granting the application will not place an undue emphasis on portions of the testimony,[87] and he must also insure that there is no miscarriage of justice by the failure to put before the jury all available, pertinent facts.[88]

The *Perkins* decision is the court's first effort at defining the procedure for reopening a case after submission to the jury, and the guides surely will be helpful. Lawyers and judges would probably welcome a comprehensive set of criminal procedure rules from the court rather than the piece-meal statute-decision system.

G. Right to Counsel in Youth Court

The petitioner in *In re Long*[89] was "sentenced" to Oakley Training School as a "delinquent-neglected child." The Mississippi Supreme Court reversed the lower court because the summons was not served on the petitioner at least three days before the hearing as required by statute.[90] Seemingly as a separate admonition, Justice Jones said the court was also wrong in not advising the petitioner of his right to have an attorney represent him at the delinquency proceeding. This was mentioned even though the court said the complaint did not bring the case within the Youth Court Act, which gives one the right to be represented,[91] and it seems to be the attempted application of this provision of a statute said not to be applicable.

By statute,[92] the hearing in a delinquency proceeding is informal, and the action is civil rather than criminal. The technical rules of evidence are not enforced in these proceedings.[93] The statute says that "any person interested in any case shall have the right to appear therein and be represented by legal counsel of his own choosing and at his own expense."[94] The Mississippi rule that juvenile courts are not criminal is the accepted view,[95] as the purpose is to look after the child's welfare and to protect and remove the child from undesirable surroundings.[96] There is a conflict of authority on whether the child is entitled to the

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[86] *E.g.*, Henry v. United States, 204 F.2d 817 (6th Cir. 1953).

[87] *Ibid.*

[88] State v. Duncan, 102 Utah 449, 132 P.2d 121 (1942).

[89] 184 So. 2d 861 (Miss. 1966).

[90] Miss. Code Ann. § 7185-06 (1956).

[91] Miss. Code Ann. § 7185-08 (1956).

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

[95] *E.g.*, People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

[96] State v. Bomar, 383 S.W.2d 41 (Tenn. 1964).

aid of an attorney in delinquency cases.[97] One view is that the juvenile is entitled to such aid only when the lack of an attorney will be an undue disadvantage, resulting in unfair treatment and causing the deprivation of rights of the juvenile without due process.[98]

The *Long* case at least indicates that when the statute applies, the juvenile should be advised that he can have a lawyer, and beyond that it may be the court's hint that juvenile cases definitely have counsel problems. By design or not, it raises rather than answers questions. Does the juvenile have an absolute right to counsel in all juvenile proceedings? Will the state furnish counsel to an indigent juvenile in youth court even though section 7185-08 of the Mississippi Code provides that the interested party has the right to be represented by counsel "of his own choosing and at his own expense"?

Because of the diversity of practice among the states and the analogy to recent right to counsel developments in criminal cases, sometime soon the United States Supreme Court will probably have to answer the questions. Meanwhile, the *Long* case, although not openly broaching the possible need of fitting the juvenile practice into the criminal counsel rules, should not be overlooked by the youth court judges, who have led the way in reforms and improvements in the system.

H. Systematic Exclusion of Negroes from Juries

Systematic exclusion of Negroes from juries again has gotten the court's attention. There is no discussion here of the development of systematic exclusion rules, as this has been settled, nor are all the Mississippi cases from the term mentioned. The focus is on cases giving guidelines for adapting the jury selection process to constitutional requirements. The problem is a potential breakdown in law enforcement unless the counties make the necessary changes.

In *Bass v. State*,[99] a conviction of rape was reversed because of systematic exclusion of Negroes in Warren County. After reviewing the statistical evidence indicating systematic exclusion, the court, not even rehashing all the decisions, said the state had not overcome the prima facie case made by the statistics. *Black v. State*[100] was a similar reversal but a lesser crime. The defendant put on statistical evidence for Chickasaw County. In holding that the state had failed to overcome the prima facie case made by the defendant, the court reaffirmed its rule that summoning only a token number of Negroes for jury service will not eliminate the objection of systematic exclusion. The state

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[97]See Annot., 60 A.L.R.2d 691 (1958).

[98]People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

[99]182 So. 2d 591 (Miss. 1966).

[100]187 So. 2d 815 (Miss. 1966).

must show that Negroes are being selected for jury service on the same basis as other qualified citizens.

In *Shinall v. State*[101] a murder conviction was reversed. The court undertook to list some rules on systematic exclusion:

(1) The systematic exclusion of Negroes from jury service violates the fourteenth amendment of the United States Constitution.

(2) "Token representation does not comply with the law."[102]

(3) Statistics evidencing disparity between races in the selection of jury panels are important in establishing systematic exclusion.

(4) After a prima facie case is established by statistics, the state must show that the disparity was not caused by racial discrimination.

(5) "Proportional representation of races on a jury . . . is not required."[103]

(6) The main requirement is to show that the jurors are selected in good faith without regard to race.

The newest systematic exclusion problem is that, by peremptory challenges and strikes, the prosecutor systematically excludes Negroes from the jury. The United States Supreme Court had this question in *Swain v. Alabama*.[104] The striking of Negroes *in a particular case* was not necessarily a denial of equal protection of the laws. Mr. Justice White said that "the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[105] Then he added that when the evidence indicates that the prosecutor in the county has consistently excluded *all* Negroes by peremptory challenges, the question changes. In *Swain* it was not shown that the prosecctor had consistently excluded all Negroes. Following this case, the Mississippi court ruled against a defendant who contended that his conviction should be reversed because of systematic exclusion of Negroes through the prosecutor's abuse of peremptory challenges.[106]

Doubtless, the definition of a prosecutor's abuse will be drawn more sharply in a few years. If evidence of abuses proves this rule to be insufficient, the adoption of a stricter rule is an easy prediction. This is within the control of the prosecutors.

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[101]187 So. 2d 840 (Miss. 1966).

[102]*Id.* at 844.

[103]*Ibid.*

[104]380 U.S. 202 (1965).

[105]*Id.* at 220.

[106]See McLaurin v. City of Greenville, 187 So. 2d 854 (Miss. 1966).

V. Domestic Relations

A. Granting Divorce When Both Are Guilty of Habitual Cruel and Inhuman Treatment

In *Hinton v. Hinton*[107] the wife brought an action for divorce against the husband on the ground of habitual cruel and inhuman treatment. The husband denied the allegations and filed a cross-bill for a divorce, likewise on the ground of habitual cruel and inhuman treatment. The chancellor entered a decree declaring that each party was entitled to a divorce. On appeal, the Mississippi Supreme Court reversed the decree and held that the divorce laws of Mississippi would not allow the habitual cruel and inhuman treatment of both parties to be the concurring proximate cause of the separation, entitling both to a divorce. To hold otherwise, according to the court, would be self-contradictory.

The pertinent rule is recrimination—neither person is entitled to a divorce if the conduct of both furnishes grounds for divorce;[108] or, as only a legalist could put it: "Recrimination is a countercharge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce."[109] This is from the equitable doctrine of clean hands.[110] Generally, matters of recrimination must be specifically pled and proved, but where there is enough evidence to sustain the defense of recrimination, the court should dismiss the suit on its own motion.[111]

The court in *Hinton* did not mention recrimination or the 1964 statute[112] relieving the mandatory application of recrimination in holding that a divorce could not be granted to both parties on the ground of habitual cruel and inhuman treatment. Instead, Justice Gillespie employed a unique line of reasoning based on proximate cause: habitual cruel and inhuman treatment must be the proximate cause of the separation to warrant a divorce, and since a separation cannot have two proximate causes, a divorce cannot be granted on the theory that both parties are guilty of habitual cruel and inhuman treatment.

From the court's past recrimination decisions, the reasoning in *Hinton* seems unnecessary. It is possible, however, that the court wanted to avoid strengthening the doctrine of recrimination in Mississippi since

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[107]179 So. 2d 846 (Miss. 1965).

[108]27A C.J.S. *Divorce* § 67 (1959).

[109]Bunkley & Morse, Amis on Divorce and Separation in Mississippi 146 (1957).

[110]*E.g.*, Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82 (1947).

[111]Dunn v. Dunn, 156 Miss. 132, 125 So. 562 (1930); Banks v. Banks, 118 Miss. 783, 79 So. 841 (1918).

[112]Miss. Code Ann. § 2735.5 (Supp. 1964).

there is a trend toward removing it as a defense in a divorce action.[113] Some states have the doctrine of comparative rectitude, which allows the court to award the divorce to the person who has committed the least serious offense.[114] To read into this opinion a tendency toward replacing recrimination with comparative rectitude probably is too optimistic, even though the court may very likely be receptive to this more realistic solution of a current problem.[115]

B. Effect of a Party's Fraud before Divorce Is Final

In the unique case of *Zwerg v. Zwerg*[116] the wife filed a bill for separate maintenance. The parties were married in 1958, and in 1963 the husband obtained an uncontested divorce in Oklahoma. An Oklahoma divorce does not become final for six months after the decree,[117] and during this period neither can marry another person.[118] During this six month period, the parties had a reconciliation and resumed their marital relations. The husband assured the wife that no formal action was necessary to vacate the Oklahoma divorce decree. In this action, the husband denied that they were husband and wife. The lower court held that the Oklahoma decree was voidable and that the husband had committed fraud in inducing his wife to resume the marital relationship. Affirming the result in the lower court, the supreme court held that because of the fraud committed on the wife by the husband, the husband was estopped from claiming that the failure to have the divorce formally set aside was a valid defense.

The Oklahoma courts have held that the remarriage of one of the parties to a divorce action within six months from the date of the divorce decree causes the marriage to be voidable and not void.[119] Other jurisdictions with similar statutes declare the remarriage void.[120] Basic in this conflict is the amount of finality given to the divorce. In Oklahoma, a divorce decree is in the nature of the common law divorce *a mensa et thoro*, and the only requirement for the divorce to become final is the expiration of the six month period.[121]

The Mississippi court acknowledged that the problem presented in

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[113]Bunkley & Morse, Amis on Divorce and Separation in Mississippi 148 (1957).

[114]*Ibid.*

[115]See 37 Miss. L.J. 322 (1966) for a detailed discussion of the *Hinton* case.

[116]179 So. 2d 821 (Miss. 1965).

[117]Okla. Stat. Ann. tit. 12, § 1282 (1961).

[118]Okla. Stat. Ann. tit. 12, § 1280 (1961).

[119]Plummer v. Davis, 169 Okla. 374, 36 P.2d 938 (1934).

[120]See Warren, Schoular Divorce Manual § 324 (1944).

[121]Atkeson v. Sovereign Camp, W.O.W., 90 Okla. 154, 216 Pac. 467 (1928).

the *Zwerg* case had never been before the Oklahoma Supreme Court. Oklahoma has held, however, that the parties to a divorce action can remarry each other during the six month period,[122] and this can be a common law marriage.[123] Since the common law marriage has been abolished in Mississippi,[124] the Mississippi court could not follow the Oklahoma rule of declaring the informal reconciliation a valid remarriage.

One laudable reason for recognizing a common law marriage is to protect people who have innocently violated some technicality of statutory marriage requirements.[125] Since the Mississippi Supreme Court no longer has this method of correcting these problems, it must find a different line of reasoning. This was done in *Zwerg*. To protect the innocent wife, the Mississippi court estopped the husband from saying that the divorce was not formally set aside. The Oklahoma court probably would have simply held that the reconciliation caused a common law remarriage.[126] Either way the same fair result is reached.

C. Wife's Liability for Necessities Purchased on Implied Contract

In *Cooke v. Adams*[127] the court, with no reluctance to change an unrealistic rule, dropped the prior requirement that for a married woman to be personally liable to pay for necessities she purchased, she must have expressly agreed to be personally liable.

> Therefore, we now overrule McLemore . . . and hold that in the absence of any express agreement, where a married woman shall obtain necessities, whether in the form of goods or services, for her own personal use or benefit, under circumstances which, if she had not been married, would give rise by implication to a contract on her part to pay for such goods or services, she shall be liable jointly with her husband, for value of such goods or services, and recovery thereafter may be had from her separate estate.[128]

A detailed examination of this case is presented in the Note on page 150 of this issue.

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[122]Thomas v. James, 69 Okla. 285, 171 Pac. 855 (1918).

[123]Dunlap v. Dunlap, 88 Okla. 200, 212 Pac. 608 (1923).

[124]Miss. Code Ann. § 465.5 (1956).

[125]See generally Bunkley & Morse, Amis on Divorce and Separation in Mississippi § 1.02(4) (1957).

[126]See Dunlap v. Dunlap, 88 Okla. 200, 212 Pac. 608 (1923).

[127]183 So. 2d 925 (Miss. 1966).

[128]*Id.* at 927.

VI. Eminent Domain

Bradley v. Bradley[129] presented a new question in Mississippi—whether proceeds should be used to restore the value of a life estate damaged by eminent domain. By his father's will the complainant acquired a life estate in his father's twenty-four acre homeplace. The remaindermen were the brothers and sisters of the plaintiff. In 1964, the State Highway Commission took almost six acres of this land as part of a limited access highway. The taking destroyed a private road connecting the place with a public road, the water line which was connected to the city's water system, fences, a small pond, and a two-room house. The highway department gave the owners $13,750 for the condemned property, and the money was put on deposit in accord with a chancery decree.

The complainant's action against the remaindermen was to obtain some of the money to repair the damages and to restore himself, as nearly as possible, to his position before the taking. The court affirmed the chancellor's order to deduct $3,135.05 "to build fences, construct a stock pond, replace a small frame dwelling, and drill a well, with a pump and pump house."[130]

The holder of a life estate, as well as the remaindermen, is entitled to compensation when property is taken for public use.[131] By the majority rule, the compensation, because it takes the place of realty, must be retained intact, with the life tenant receiving the income and the principal being reserved for distribution to the remaindermen.[132] The minority rule requires paying a lump sum, computed from life insurance annuity tables, to the life tenant.[133] The too-proud criticism of the minority rule is that " 'probable life' is simply a statistical fiction, and the chances are very small that the tenant will actually live for the duration of his 'probable life.' "[134]

The Mississippi court mentioned the various methods of distributing the award among the owners when there is a life estate and recognized the chancellor's solution as a variation of the procedure used by some courts in which the proceeds are invested in similar property. To disallow the claim of the complainant would violate the intent of his father's will and nullify enjoyment of the place. The remaindermen may rather have cash plus the damaged property, and this would be satisfactory, except for the life tenant, whose rights were properly

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[129] 185 So. 2d 655 (Miss. 1966).

[130] *Id.* at 657.

[131] *E.g.*, Brugh v. White, 267 Ala. 575, 103 So. 2d 800 (1957).

[132] *E.g.*, Lucas v. Lucas, 104 Tex. 636, 143 S.W. 1153 (1912).

[133] Orgel, Valuation Under Eminent Domain § 116 (1936).

[134] *Id.* at 399.

protected this time. But good sense does not require this method to be binding in easily thought of instances when it would produce an inequitable solution, and there is no indication that this is anything other than an *ad hoc* solution, which does not preclude a different method for solving a dissimilar life tenant problem.

VII. Future Interests

By using the doctrine of "equitable approximation" in *Carter v. Berry*[135] four years ago, the court followed a trend providing relief from the often harsh results arising from the common law Rule Against Perpetuities.[136] Now in *Phelps v. Shropshire*,[137] the court has used the "wait and see" doctrine against the Rule, although referring to it as the "possibilities" application of the Rule.

The "wait and see" doctrine says that it is the actual events rather than possible events which decide whether a contingent interest vests within the period of the Rule.[138] The Rule has been modified by this doctrine both by judicial decision[139] and statute[140] in other states. The purpose of the court's modifications is to carry out as closely as practical the testator's intention instead of having it defeated by a needlessly rigid application of an old rule. The modifications still guard against the Rule's prohibition but deal more fairly with a violation.

In this case the holographic will purported to establish a trust for the benefit of a named church and a fraternal order, but if they found the property a burden, the "family" was to be given a chance to purchase the property. When the two beneficiaries rejected the gift, the administrator asked for a construction by the court. The importance of the case is the court's continuing to protect against the Rule. The judicial modifications serve a good purpose but do not give practicing lawyers the same assistance in drafting wills and trusts that comprehensive perpetuities legislation would give.[141]

VIII. Insurance

A. Insurer's Duty to Defend

The result in *Mavar Shrimp & Oyster Co. v. United States Fid. &*

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[135]243 Miss. 321, 356, 140 So. 2d 843 (1962).

[136]"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, The Rule Against Perpetuities § 201 (4th ed. 1942).

[137]183 So. 2d 158 (Miss. 1966).

[138]Simes & Smith, Future Interests § 1230 (2d ed. 1956).

[139]*E.g.*, Merchant Nat'l Bank v. Curtis, 98 N.H. 340, 97 A.2d 207 (1953).

[140]*E.g.*, Ky. Rev. Stat. § 381.216 (1963).

[141]For a full discussion of this case see 37 Miss. L.J. 487 (1966).

Guar. Co.[142] requiring the insurer to defend a claim which, if established, would not have been covered by the policy is fair, but as precedent its rationale may be troublesome in the future. The insured was the defendant in two suits in which the complainant claimed that while in the course of his employment with the insured, he received severe, accidental back injuries. The insurer refused to defend the suits. The insured undertook the defense, settled the suits for $2,500, and filed this action to recover its expenses from the insurance company. The policy coverage excluded injuries to the insured's employees. The insurer knew of the insured's success in other cases in showing that persons in the same position as the complainant in the settled suits were not employees. The policy obligated the insurer to defend suits arising from covered risks "even if such suit is groundless, false or fraudulent."[143]

The lower court agreed with the insurance company's argument that since the policy did not cover the claim as stated in the complaint, the insurer had no duty to defend. Reversing the lower court, the Mississippi Supreme Court said the agreement to defend groundless, false, or fraudulent suits was ambiguous and a strict construction of the clause against the insurer brought the suits within the agreement to defend.

The insurer must defend the insured against all actions in which the complaint alleges a risk covered by the policy.[144] The insured's duty to defend is governed by looking at the allegations of the complaint.[145] The fact that the suit may be groundless, false, or fraudulent does not alter the duty.[146] Some courts add to this by requiring the insurer to take into account facts within its knowledge rather than looking exclusively to the allegations of the complaint.[147] If the insurer decides not to defend, it must suffer the consequences of breach of contract if the duty to defend is later established.[148]

In *Mavar,* the court may have been trying to adopt the rule which judges the duty by facts within the insurer's knowledge. Instead of saying so, the court said:

> While there is authority to the contrary, we are of the opinion that if the obligation requiring the insurance company to defend suits that are groundless, false or fraudulent is to have any real

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142187 So. 2d 871 (Miss. 1966).

143*Id.* at 873.

14429A Am. Jur. *Insurance* § 1448 (1960).

145*Id.* at 1452.

146*Id.* § 1448.

147Annot., 50 A.L.R.2d 458, 500 (1956).

148*Id.* at 463.

> meaning, then under the facts and circumstances of this case, the Insurance Company had the obligation to defend. If the Insurance Company had intended otherwise, it could have made its intent clear by stating that its obligation to defend was confined to those cases where the declaration alleges facts that come within the coverage of the policy.[149]

The trouble with this as the rationale is that it means that there was a duty to defend because the claim was groundless, false, or fraudulent. The majority opinion in *Wilson v. Maryland Cas. Co.*[150] criticized this solution of the problem. "[T]he Company's obligation was not to defend all suits and claims whatsoever merely because they were groundless, but to defend all suits and claims *covered by the policy whether or not* they were groundless . . . . The question is not to the truth or falsity of a claim, but whether it is covered by the policy; if it is, the Company must defend it; if it is not, its truth or falsity is wholly immaterial."[151] Requiring the insurer to defend, merely upon notice from the insured that the claim was false, is far from a reasonable construction, and *Mavar* probably should not be taken to mean this.

Instead of deciding the case by the questionable construction of an ambiguous clause, the court could have merely adopted the rule that the insurer's knowledge is pertinent in defining the duty to defend. The insurer's knowledge of Mavar's previous success in resisting similar claims of employment status surely was important to the court, and until the end of the opinion, it seems that the case will be decided on that basis. It is easy to get the idea that the court intended to adopt this rule. Maybe it will next time.

B. Construction of a Disability Definition

In *Prudence Life Ins. Co. v. Wooley*[152] the problem was to decide whether a contract defining disability as "the inability of the insured to engage in his regular occupation or in any gainful occupation for which he is reasonably fitted by education, training or experience"[153] required the insured to meet only one or both tests of disability. The court said both tests must be met, but this is another one of those "Am. Jur." opinions[154] that never really gets to the problem.

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[149]Mavar Shrimp & Oyster Co. v. United States Fid. & Guar. Co., 187 So. 2d 871, 875 (Miss. 1966).

[150]377 Pa. 588, 105 A.2d 304 (1954).

[151]*Id.*, 105 A.2d at 306.

[152]182 So. 2d 393 (Miss. 1966).

[153]*Id.* at 394.

[154]A written opinion in a reported case, at least thirty percent of which is a quotation from an encyclopedia.

The problem is one of construction. The questionable sentence can be read either way. Because it is ambiguous, perhaps it should be construed strongly against the insurance company. Instead of talking about this problem, the court said the language in the contract made this case different from the previous Mississippi cases and brought it squarely within the *Am. Jur. rule.* No other reason for the result is given, and there is no answer to two important questions arising from the ambiguity: (1) If the provision meant to require that both tests be met, "and" would have been used instead of "or". (2) The reason for referring to the other occupation was not to set up another test but to make it clear that one could still be totally disabled within the meaning of the policy even though he was gainfully employed at a dissimilar job for which he was not reasonably fitted by training, education, or experience.

IX. Jurisdiction

In two cases the new "long arm" statute[155] was held not to be retroactive and not long enough to reach "Life" magazine. Mladinich's earlier slander suit against a Louisiana resident had been dismissed for lack of personal jurisdiction of the defendant in Mississippi.[156] In the second *Mladinich v. Kohn,*[157] the plaintiff sought a retroactive application of the long arm statute. The supposedly all-inclusive amendment, which became effective on July 1, 1964, gave the plaintiff another argument, even though the cause of action arose before the effective date of the amendment. The argument is that remedial statutes, such as this, apply retroactively and that this is not an attempt to give retroactive effect to a substantive statute. Alabama,[158] California,[159] Louisiana,[160] New York,[161] and West Virginia[162] are among the states with this rule. The court declined to make the distinction between remedial and substantive legislation, which would require overruling at least five Mississippi cases mentioned in the opinion. Its rationale, supported by ample authority,[163] is simple. "A statute will not be given retroactive effect unless it is manifest from the language that the legislature intended

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155Miss. Code Ann. § 1437 (Supp. 1964).

156Mladinich v. Kohn, 250 Miss. 138, 164 So. 2d 785 (1964).

157186 So. 2d 481 (Miss. 1966).

158Barrington v. Barrington, 200 Ala. 315, 76 So. 81 (1917).

159Ringel v. Superior Court, 54 Cal. App. 2d 34, 128 P.2d 558 (Dist. Ct. App. 1942).

160Brown v. Indemnity Ins. Co., 108 So. 2d 812 (La. App. 1959).

161Wolk v. City of New York, 37 N.Y.S.2d 352 (N.Y. City Ct. 1942).

162Lester v. State Compensation Comm'r, 123 W. Va. 516, 16 S.E.2d 920 (1941).

163See Note, *Retroactive Expansion of State Court Jurisdiction Over Persons,* 63 Colum. L. Rev. 1105 (1963).

it to so operate."[164] The result seems fair in this case, and surely this rule will minimize appeals arguing that a statute applies retroactively.

Breckenridge v. Time, Inc.[165] demonstrates a legislative-judicial conflict. What broader language could have been used in the 1964 amendment to indicate the legislature's intention to subject as many non-residents as possible to personal jurisdiction in the state? Two cases,[166] decided under the pre-amendment statute, picture the court as moving toward extension of personal jurisdiction, yet far from the "minimum contacts" and "traditional notions of fair play and substantial justice" constitutional boundary. On its face this decision seems to curtail the pre-amendment movement, which at least was extending the state's personal jurisdiction toward the constitutional limit. But more, it seems to ignore the legislature's intention to provide impetus for the movement.

There are three unknowns which make this case of questionable significance in the future application of the long arm statute. The cause of action may have arisen before the effective date of the amendment. *Mladinich v. Kohn* later held the statute not retroactive. There is now the argument that even though the court purported to decide *Breckenridge* on the sweeping amended statute, the case has little value as precedent because the result of this application of the statute has been made moot by the nonretroactive decision. Of course, this does not overcome the attitude of the court's personnel.

The alleged defamatory news story is from the 1964 slayings of three civil rights workers in Neshoba County. Hesitancy to have this politically loaded case, which could bear on the state's national image, go to the United States Supreme Court very easily could have had an immeasurable, intangible, even subconscious effect on the decision.

Even moderately nonlocal gatherers, disseminators, and publishers of the news seem to have a special immunity from local jurisdiction.[167] Although the court has not admitted the existence of a special category, the cases cannot be otherwise explained. For instance, in commenting on the constitutional requirement that the nonresident do some act or consummate some transaction within the state, the court said:

> Time, Inc. did not purposefully do any act or consummate any transaction in this state, so the cause of action did not arise

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[164]Mladinich v. Kohn, 186 So. 2d 481, 483 (Miss. 1966).

[165]253 Miss. 833, 179 So. 2d 781 (1965).

[166]Century Brick Corp. v. Carroll, 247 Miss. 514, 153 So. 2d 683 (1963); Jarrard Motors, Inc. v. Jackson Auto & Supply Co., 237 Miss. 660, 115 So. 2d 309 (1959).

[167]Lee v. Memphis Publishing Co., 195 Miss. 264, 14 So. 2d 351 (1943); Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

> from any act or transaction in this state. The quality, nature, and extent of the activity of appellee in the forum state were at the most inconsequential. The photographs were taken by an independent photographer in this state. The information was obtained from news services and 'stringers' who were not employees of appellee. They sold the picture and information to Time, Inc. in New York.
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> It would be unreasonable under these facts to assume jurisdiction, and would offend traditional notions of fair play and substantial justice. Those minimal contracts which are prerequisite to personal jurisdiction of the courts of Mississippi over a nonresident defendant are totally lacking as to appellee. Nor did this action arise out of any commercial or business transaction taking place in this state. Certainly just any inconsequential contact with the state of the forum is not sufficient to support jurisdiction over a nonresident under the due process clause.[168]

This ignores the real questions. The damages would occur in the state, and Time, Inc. purposefully circulated its allegedly offending magazines in Mississippi. The essential business of Time, Inc. is selling its magazines, and it does not shy from Mississippi subscription money or cashing in on Mississippi news stories. Allowing Time, Inc. to insulate itself by technically making sales outside the state, by selling only indirectly or inconsequentially in the state, and by getting local stories and pictures indirectly or by inconsequential acts, embarrasses the lack of due process argument, unless of course, Time, Inc. gives the money back.

There is no discussion of the statute's application to a nonresident "who shall make a contract with a resident of this State to be performed in whole or in part by any party, in this State, or who shall commit a tort in whole or in part in"[169] Mississippi. Perhaps the court, aware of the unexpressed but recognizable special rules for news companies, was trying to protect the statute from an unconstitutional application.

The best guess is that this application of the statute to an interstate publication is not indicative of the treatment the statute will get from the court in later cases. Except for this area, the prediction is that the statute will be used to extend the amenability of nonresidents to local jurisdiction, taking care not to overstep the indefinite constitutional bounds.

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[168]Breckenridge v. Time, Inc., 253 Miss. 835, 843-44, 179 So. 2d 781, 784 (1965).

[169]Miss. Code Ann. § 1437 (a) (Supp. 1964).

X. Tax Titles

Complainant and his wife owned land as tenants in common. In 1939 the land was sold at a tax sale. The purchaser later sold it to another from whom the complainant's mother-in-law acquired her interest in the land. Before the tax sale, the wife was non compos mentis. The husband, and his wife by next friend, filed an action against the mother-in-law for an adjudication of their rights to redeem the land from the sale. The testimony at the trial showed a fiduciary relationship between the wife and her mother. Upon this evidence, the trial court ruled that the mother had redeemed the land for the benefit of her daughter and the husband. The decision was affirmed.[170] A person who occupies a fiduciary relationship to one co-tenant cannot acquire a tax title to the property of the co-tenancy, the property being the subject of the fiduciary relationship, without in effect redeeming the title for both tenants in common.

When one of several co-owners acquires title to the common property by tax sale, the benefit of the purchase inures to all the co-owners.[171] The existence of the fiduciary relationship between co-tenants requires this.[172] On the other hand, some decisions say that if the sale is public and there is no fraud or deceit by the purchasing co-tenant, the rule does not apply.[173] No cases were found in other jurisdictions with the same situation as this case, although it has been held that the husband of a co-tenant could not purchase at a tax sale to the detriment of the other co-tenants.[174] An extension of this reasoning is in a case[175] which held that a wife could not purchase common property at a tax sale with money given her by her father and thus cut off her husband's interest in the property. The same result was reached when a father-guardian purchased common property for his minor son, a co-tenant, although here there was fraud present also.[176]

The rationale in this case, rather than making a new rule in Mississippi, is a logical extension of existing rules. As pointed out by the court, two earlier cases[177] decided that one tenant in common could not acquire sole title to jointly owned land through a tax title. Likewise, a tenant in common was unable to acquire title to jointly owned

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[170]Whelchel v. Solomon, 180 So. 2d 642 (1965).

[171]14 Am. Jur. *Cotenancy* § 54 (1938).

[172]*Id.* § 51.

[173]*Id.* § 53.

[174]Toole v. Lawrence, 144 Neb. 779, 14 N.W.2d 607 (1944).

[175]Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).

[176]Parish v. Machen, 144 La. 589, 80 So. 887 (1919).

[177]Howard v. Wactor, 41 So. 2d 259 (Miss. 1949); Clausell v. Riley, 188 Miss. 647, 196 So. 245 (1940).

land by purchase from a stranger who claimed under a tax sale.[178] The Mississippi statute[179] allows a mentally incompetent person to redeem land within two years after being restored to sanity.

XI. Torts

Perhaps the most significant civil case from the 1965-66 court term is *State Stove Mfg. Co. v. Hodges*,[180] which substitutes strict liability for negligence as the theory for recovery in product liability cases. The plaintiffs had a house built by a contractor, and while building the house, the contractor installed an electric water heater obtained from a wholesaler who got it from the manufacturer. Subsequently, the heater exploded and substantially destroyed the house and its contents. The plaintiffs brought an attachment action against the manufacturer and the contractor. The contractor was dismissed because the chancellor found that there was no negligence in the installation of the heater. But the chancellor said the manufacturer had been negligent in the construction of the water heater, and the plaintiffs were awarded damages of $10,900 from the manufacturer. The manufacturer appealed from the decree against it, and the plaintiffs appealed from the dismissal of the contractors.

The court had three main questions: (1) Did lack of privity between the manufacturer and the plaintiff protect the manufacturer from plaintiffs? (2) If privity is not required, on what theory is the manufacturer liable to the consumer? (3) Under the theory decided upon, did these facts meet the requirements for liability?

On the first question the court held that privity of contract is not necessary in an action by a consumer against the manufacturer. The court reviewed the history of the rule and acknowledged that Mississippi was the only state which had not expressly removed the privity requirement. There is no discussion here of this widely accepted view.

On the second issue, the court adopted the theory of strict liability as the basis of the manufacturer's liability to the consumer. The theory of strict liability on manufacturers has swept the states probably faster than any new judicial theory in the private civil area. As stated in *State Stove*, only seven years have lapsed since the first decision applied strict liability to articles other than food products, and already about half the states have adopted the rule.[181]

It has been suggested by Dean Prosser that there are three primary

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[178]Griggs v. Griggs, 218 Miss. 433, 67 So. 2d 450 (1953); Howard v. Wactor, 41 So. 2d 259 (Miss. 1949).

[179]Miss. Code Ann. § 9948 (1952).

[180]189 So. 2d 113 (Miss. 1966).

[181]Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 12 (1965).

reasons for the adoption of strict liability.[182] (1) "The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves . . . ."[183] (2) By placing the goods on the market, the supplier represents the goods to be safe for use. (3) Under the old rule requiring a showing of negligence and warranty, it was possible to obtain the strict liability result by using a series of actions in which the seller was first held liable, and by indemnity suppliers were liable, until the manufacturer eventually paid for the damages. These actions only added the unnecessary cost and delay of repeated litigation. Another reason suggested for the adoption of strict liability is that it is fairer to impose liability on the one creating the risk and reaping the profit.[184]

Underlying the adoption of strict liability is the comparative ability of the injured person and the manufacturer to absorb the loss.[185] This pragmatic idea says accidental injuries are inevitable and liability should, therefore, be placed on the party best able to pay.[186] Although this reason for strict liability is not usually openly embraced in the opinions, it was expressed in a concurring opinion in a California case:[187]

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public.[188]

Though largely unexpressed in the development of this rule, "an entire field of legislation, illustrated by the workmen's compensation acts, has been based upon the same principle."[189]

The Mississippi court decided that its strict liability rule will be governed by section 402A of the *Restatement (Second)*. Under this rule "the manufacturer is liable strictly in tort only if (a) he puts on the

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[182]See Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099 (1960).

[183]*Id.* at 1122.

[184]See Suvada v. White Motor Co., 212 N.E.2d 182 (Ill. 1965).

[185]See PROSSER, *Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1120 (1960); PROSSER, TORTS 508-09 (3d ed. 1964).

[186]See PROSSER, TORTS 509 (3d ed. 1964).

[187]Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion).

[188]*Id.*, 150 P.2d at 441.

[189]PROSSER, TORTS 508 (3d ed. 1964).

market a product which is not reasonably safe, and (b) the plaintiff is injured as a result of a contemplated use of it."[190] The court pointed out that this rule did not make the manufacturer an insurer for all harm caused by his product, but merely removed the necessity of proving that the manufacturer created or was aware of the unsafe condition of the product. "Strict products liability clearly does not require a perfectly safe product."[191]

After stating the rule to be used, the court in *State Stove* considered the third question—did these facts meet the requirements for liability? On this the court split five to four, causing the unusual occurrence of having the same judge write the majority and the minority opinions. The majority said the manufacturer was not liable under the *Restatement* rule because the heater was not manufactured in an unreasonably dangerous and defective condition. The failure of the contractor to install the heater properly was the intervening, sole proximate cause of the explosion. After giving the opinion of the majority, Chief Justice Ethridge also wrote the dissenting opinion, stating that he and three other justices thought that the manufacturer should be held liable for the damage to the plaintiffs' house. The basis for the dissent was that the product was in a defective condition, unsafe for its intended use, when it left the manufacturer, and the contractor's failure to discover the defect or follow the manufacturer's installation instructions did not relieve the manufacturer of liability. The majority's rationale allowed the manufacturer to delegate to the builder the duty of installing devices (valves) which would make the product safe. The minority thought the manufacturer must assume this duty and could not delegate it.

One authority in tort law says that "where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."[192] In addition to this, or perhaps explanatory of it, negligence is a hale fellow, easier driven from our language than from our thought patterns by which legal liability is decided (often before the applicable theory comes to mind). So even though this case says negligence has been replaced, the real question of whether the replacement is only nominal lies ahead. The minority obviously fear that the majority's subconscious attachment to an old friend prevents the unfettered reign of its young successor. Because of this, we cannot predict that substantial changes in our practice will follow hard on the heels of this change in our law.

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[190]State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966).

[191]Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 12, 16 (1965).

[192]Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1114 (1960).

XII. Wills

A. Joint Wills

A husband and wife executed a joint will in which they provided that the survivor should get the joint estate in "fee simple," and that upon the death of the survivor half the remaining estate would go to each of their respective families. The husband died and the joint will was admitted to probate as his will. The wife did not attempt to renounce the will. The wife later began to remove funds from the estate and to establish joint savings accounts with certain members of the two families. Upon her death the joint accounts were discovered. The co-executor's petition to withdraw the application for approval of the final account alleged that the joint accounts were an attempt to circumvent the provisions of the joint will. The chancellor's approval of the final account and discharge of the co-executors was reversed.[193] The joint will was reciprocal, being contractual in nature, and the survivor, having accepted benefits from the will, was estopped from altering the will's effect by disposing of the money as she pleased.

Joint wills are usually held valid.[194] The rules of construction of joint or mutual wills are typical and say that the testators' intentions, as expressed in the will, must prevail.[195] There are conflicting ideas about the revocability of joint wills,[196] although this conflict is resolved against revocability if the wills are reciprocal because of contractual provisions.[197] The main problem is the handling of funds received under a joint will. The court's answer was simple. The will is a binding agreement. After accepting benefits from the will, the person is estopped from making a different disposition of the property than that contemplated by the agreement.[198] It should be noted that the result in this case was actually made possible by the court's acceptance of the will as a contract. By judging the instrument as a contract, the court avoided the problem of what type estate was actually given to the wife by the will, and the court was not forced to consider the wife's right to dispose of property held in a "limited fee simple."[199]

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[193]Monroe v. Holleman, 185 So. 2d 443 (Miss. 1966).

[194]97 C.J.S. *Wills* § 1365 (1957).

[195]*E.g.*, *In re* Sharar's Estate, 136 Pa. Super. 478, 7 A.2d 506 (1939).

[196]See 97 C.J.S. *Wills* § 1366 (b) (1957).

[197]*Ibid.*

[198]Annot., 169 A.L.R. 49 (1947). For a comprehensive listing of cases on the question of estoppel to contest wills see Annot., 28 A.L.R.2d 116 (1953).

[199]See 21 Miss. L.J. 179 (1949) for a brief discussion of the prerequisite contractual implications necessary to make a mutual will.

B. Late Renunciation for Incompetent Wife

From his estate of over $15,000, the husband's only testamentary gift to his incompetent wife was $100. The executor's petition for approval of the final account asked for authority to pay the $100 bequest directly to the widow, who had no guardian and had been incompetent continuously since a time before her husband's death. Instead of approving the payment, the chancellor appointed a guardian ad litem for the widow and accepted the guardian's renunciation for the widow even though it was filed after the expiration of the statutory six-month period.[200] The supreme court affirmed the chancellor's action.[201] When "a widow has been mentally incompetent continuously from the death of the testator, and she has had no guardian acting in her behalf during the statutory period for renunciation, its lapse is no bar to a subsequent election in her behalf by the court or a guardian acting under supervision and approval of the court."[202]

This is the first time for this question in Mississippi. It has been decided that a guardian, with the court's approval, could renounce a will for an incompetent widow during the statutory period.[203] The problem is that the statute on renunciation (section 668) does not have a savings clause for an incompetent widow, and the general savings statute[204] does not apply to the section 668 right. Not that precedent from other states would be helpful in solving the problem, but there are cases against the time extension,[205] and there is analogous authority in favor of it.[206] The court decided the question "in the light of its history and essential legislative purpose"[207] in giving the widow the right. "[T]he well-settled policy of the law to protect a widow's interest in the estate of her deceased husband, and the plain equities"[208] could lead to no other result.

XIII. Workmen's Compensation

A. Pleading Apportionment

Two cases point out an apportionment pleadings problem, and unfortunately the logical inconsistencies in the decisions promise more problems. A bothersome pleadings system is foreign to the underlying

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200Miss. Code Ann. § 668 (1956).
201Wolcott v. Wolcott, 184 So. 2d 381 (Miss. 1966).
202*Id.* at 383-84.
203Hardy v. Richards, 98 Miss. 625, 54 So. 76 (1910).
204Miss. Code Ann. § 738 (1956).
205*E.g.*, First Nat'l Bank v. Schaake, 240 Mo. App. 217, 203 S.W.2d 611 (1947).
206See Annot., 147 A.L.R. 336 (1943).
207Wolcott v. Wolcott, 184 So. 2d 381, 384 (Miss. 1966).
208*Ibid.*

theory that workmen's compensation should be an easily executed system for providing benefits inexpensively and quickly to injured workers. By complicating the pleadings rules, these two cases pose a potential, needless constriction in the flow of compensation claims.

In *Armstrong Tire & Rubber Co. v. Payton*[209] an employer who had not pled apportionment was nonetheless entitled to have an award apportioned because the claimant's pleadings mentioned the pre-existing disease and medical evidence of the pre-existing condition was a part of the claimant's case; but in *Mississippi Tank Co. v. Walker,*[210] decided thirty days later, an employer who failed to plead apportionment was not entitled to have an award apportioned even though the record contained medical evidence of the pre-existing condition.

Armstrong is as follows: The claimant's husband died of a ruptured aneurysm. The aneurysm (enlargement of the wall of an artery) was the pre-existing disease, and the issue was whether the rupture was caused by the work. In a former appeal,[211] the court, saying "the physical labor which the deceased performed on the day of his death aggravated his pre-existing condition and contributed to the ruptured aneurysm which caused his death,"[212] remanded the case to the Commission for an award. The employer had not pled apportionment; there was medical evidence of the pre-existing condition; but there were no apportionment estimates. At the remand to the Commission, the employer's petition for apportionment and motion to allow an amendment for pleading apportionment were denied by a two-to-one vote.

At the original hearing the issue had been stipulated: was there a causal connection between the death and the employment? The circuit court judgment in the first appeal was entered on August 20, 1963. At that time, the cases[213] required the following for apportionment: (1) a pre-existing physical handicap, disease, or lesion, (2) shown by medical evidence, (3) to be a material contributing factor in the results following injury. It was clear that if the medical evidence was not in the record, the employer was not entitled to apportionment, but there was no requirement that his pleadings request apportionment on account of the pre-existing condition.

The statute says that the award "shall" be apportioned.[214] Procedural

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[209]186 So. 2d 217 (Miss. 1966).

[210]187 So. 2d 590 (Miss. 1966).

[211]Payton v. Armstrong Tire & Rubber Co., 250 Miss. 407, 165 So. 2d 336 (1964).

[212]*Id.* at 413, 165 So. 2d at 338.

[213]Southeastern Constr. Co. v. Dodson, 247 Miss. 1, 153 So. 2d 276 (1963); Federal Compress & Warehouse Co. v. Clark, 246 Miss. 868, 152 So. 2d 921 (1963); Cuevas v. Sutter Well Works, 245 Miss. 478, 150 So. 2d 524 (1963).

[214]Miss. Code Ann. § 6998-04 (Supp. 1964).

Rule 4 says "All affirmatitve defenses such as intoxication of the injured, wilful intent to injure himself or another, statute of limitations, lack of notice, etc., must be pled. Unless so pled they shall be deemed waived."[215] The basis of the problem is that no one knows what is or is not intended to be within the "etc." The employer argued[215] that it referred only to defenses which would bar recovery, as all the named affirmative defenses are of that type.

Six months after the original judgment in the circuit court the state supreme court decided *Mississippi Federated Co-ops. v. Roberts*,[217] which is cited as authority for the proposition that unless the employer pleads and proves the pre-existing condition (as well as the contribution of the injury to the results), there can be no apportionment of an award. The requirement of pleading the pre-existing condition thus appeared in an opinion for the first time, and it was not necessary to the decision in which it was announced—it was dicta. There was no evidence in the record that the pre-existing condition contributed to the results following the injury, and this finding alone precluded apportionment. The pleadings question was really not an issue in *Roberts*.

The court, however, has the opinion that *Roberts* is good authority for the pleading requirement. Even if it is, the employer in *Armstrong* made an argument[218] supported by good sense and precedent that the amendment should have been allowed to cure a defect resulting from a rule announced long after the pleadings were in.[219]

The supreme court agreed with the overruling of the motion to amend but disagreed with the denial of the petition for apportionment. Instead of overruling *Roberts*, a new rule was adopted, engrafting a delicate exception on the rule cited from *Roberts*. The new rule is that the defendant does not have to request apportionment in the pleadings or mention the pre-existing disease if the existence of the disease appears from the claimant's pleadings. Claimant's reference to the aneurysm was the pleading of the pre-existing condition, and "it was immaterial that it was asserted or pled by the claimant."[220] Further, the claimant's case showed the aggravation of the pre-existing condition, so the claimant did practically all that was necessary for the employer to get the award apportioned. Ironically, the claimant could not have done otherwise, for a showing that the aneurysm ruptured required a showing of this necessarily pre-existing disease.

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[215]Rules and Regulations of the Mississippi Workmen's Compensation Commission.

[216]Original Brief for Appellant, p. 7.

[217]248 Miss. 732, 160 So. 2d 922 (1964).

[218]Original Brief for Appellant, p. 22.

[219]*E.g.*, Nichols v. Gaddis & McLaurin, Inc., 228 Miss. 1, 87 So. 2d 673 (1956).

[220]Armstrong Tire & Rubber Co. v. Payton, 186 So. 2d 217, 222 (1966).

If the majority felt it unfair not to apportion the award in the face of such clear evidence, allowing the amendment would have been a cleaner method and one not so likely to complicate the pleadings rules and cause needless appeals.

The four dissenting judges said there can be no apportionment unless the employer pleads the pre-existing condition and his failure to plead it is a waiver of his right to apportionment. In distinguishing *Roberts*, the majority did not openly embrace the employer's argument that "shall" in the statute makes apportionment mandatory if there is medical evidence of the causal connection between the pre-existing disease and the results following the injury but the minority thought this idea, if not implicit in the majority's written opinion, surely could be inferred by a fair reading of the opinion. The minority opinion is against allowing the amendment to bring in a new defense; is against distinguishing this case from *Roberts*; is against the notion that apportionment is mandatory if there is sufficient medical evidence in the record but no apportionment request in the employer's pleadings; and is against apportionment when the record contains no medical estimates of the percentage of apportionment.

Six months after *Armstrong*, the result in *Mississippi Tank Co. v. Walker*[221] illustrated the impracticality and complications of the new rule. As in *Armstrong*, the employer's pleadings did not request apportionment. The employer's answer said, "Death resulted from natural causes, wholly unrelated to employment. It is denied that deceased's employment aggravated, precipitated or accelerated the fatal onset of a coronary occlusion from which death ensued."[222] The medical evidence showed that arteriosclerosis caused the coronary occlusion, which caused the myocardia infraction, which caused the death.[223] The work aggravated the arteriosclerotic condition. The employee's pleadings mentioned the myocardia infraction; the employer's mentioned the coronary occlusion; and, presuming on the rationale of *Armstrong*, if either had mentioned arteriosclerosis, the employer would have been entitled to apportionment. But the magic word was absent, so the case was not within the delicate *Armstrong* exception which sometimes protects an employer who does not request apportionment. A sense of fairness obviously was important in creating the *Armstrong* rule, but the absence of one magic word prevented the court from granting apportionment in an equally deserving case.

Perhaps the lawyers henceforth will always plead in the alternative—no work relation, or, if so, apportionment—and prevent the necessity for

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[221]187 So. 2d 590 (Miss. 1966).

[222]Record, p. 3.

[223]Record, pp. 109, 133.

using *Armstrong*, which surely does not cure the ambiguity of Procedural Rule 4. The wording of this rule is the real culprit and the only cure is to amend it.

Procedural Rule 4 should be amended to make it clear either that apportionment is an affirmative defense which is waived, if not pled, or is not such a defense. The problem is in the use of "etc." in the rule. It was put in at the insistence of claimants' attorneys[224] who wanted a basis for arguing that the employer had waived an unnamed defense by failure to plead it. Used in a contract, statute, rule, or regulation, "etc." is as much a bastard as "and/or," and its use will sooner or later cause needless litigation and uncertainty.

Procedural Rule 4 should be amended. It now says:

> All affirmative defenses such as intoxication of the injured, wilful intent to injure himself or another, statute of limitations, lack of notice, etc., must be pled.

If apportionment is such an affirmative defense, the offending sentence could be cured by changing it to read:

> All affirmative defenses such as intoxication of the injured, wilful intent to injure himself or another, statute of limitations, lack of notice, pre-existing physical handicap, disease or lesion must be pled.

A more comprehensive version could be:

> All affirmative defenses such as intoxication of the injured, wilful intent to injure himself or another, statute of limitations, lack of notice, pre-existing physical handicap, disease or lesion, and any other defense which will completely bar or reduce the amount of compensation must be pled.

If the rule is intended to require pleading only of affirmative defenses which will completely bar compensation, it could be changed to read:

> All affirmative defenses such as intoxication of the injured, wilful intent to injure himself or another, statute of limitations, lack of notice or any other defense which will completely bar compensation must be pled.

B. Decision on Employee's Injury Claim is Res Judicata against Dependent's Claim for Death Benefits

On a new question, the court chose a rule with little support in

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[224]As told to the author by an insister who is said to have written the rule.

reason or precedent from other states, making this a decision ripe for overruling. Proctor filed a claim for compensation benefits for an injury alleged to have arisen out of and in the course of his employment. The attorney referee awarded compensation and, on appeal to the Commission, benefits were denied. The circuit court affirmed the Commission, and while the case was on appeal to the Supreme Court of Mississippi, the case was settled by a payment to the employee, and an order of dismissal was entered in the circuit court. His wife was made a party in the circuit court for the settlement. She also signed the release, but his other dependents were not parties to the settlement or the release. Proctor died later and his dependents, including his widow, sought death benefits. The employer's plea of res judicata was upheld by the Commission, the circuit court, and the supreme court. The case, *Proctor v. Ingalls Shipbuilding Corp.*,[225] decided this: when an employee is denied compensation because his injury did not arise out of and in the course of his employment, his unsuccessful suit is res judicata as to the claims of his dependents when they later seek death benefits for the same injury.

1. *The Res Judicata Rule*

In holding that res judicata was applicable to the facts in the *Proctor* case, the court had to find that (1) privity exists between an employee and his dependents and (2) only one right of recovery (cause of action) exists for an injury in favor of an injured employee and his dependents who claim death benefits when the employee later dies from the injury.

The court said "the question is whether after such fact [the employee's injury] has been adjudicated against the employee, his dependents can re-litigate same after his death."[226] The court's answer was that "the sounder rule is to prevent re-litigation of questions already fully litigated. Certainly, all parties are involved and necessarily so in the manner in which the injury is received."[227] The last statement is a fundamental error, overlooking the absence of representation of other dependents in the settlement. Although this result may be explained as strictly a policy decision against relitigating a question, the holding that res judicata is applicable to the dependent's claim logically is incorrect for the following reasons: (1) res judicata is inapplicable if two separate rights of recovery exist as they do here, and (2) privity does not exist between the employee and his dependents.

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[225] 183 So. 2d 483 (Miss. 1966).

[226] *Id.* at 485.

[227] *Ibid.*

2. *Separate Rights of Recovery*

Larson discusses the issue.

> The dependent's right to death benefits is created directly by statute; it is not derived from the rights of the deceased employee. . . . [A]n adverse decision on the merits of a claim by the employee while he was alive does not bar a dependency claim under the doctrine of res adjudicata, since the parties and rights involved are different, and since the dependent is not in privity with the injured employee as to the rights asserted by him.[228]

The question of whether two separate and distinct rights exist has not often been put to the court, but the Mississippi court has recognized[229] that there are two separate rights—one for the employee upon injury and one for the dependents upon the death of the employee. Most interesting, though, is another Ingalls case decided just four months after *Proctor*. In *Ingalls Shipbuilding Corp. v. Harris*,[230] the court specifically pointed out the two entirely separate rights of recovery created by the Workmen's Compensation Act—one in favor of the employee and another for his dependents when he dies from the injury. The court held that the statute of limitations to be applied against the dependents in a claim for death benefits begins to run from the date of the employee's death and not from the time of the employee's injury. Thus the situation could arise in which an employee's claim would be barred by the time limitation, but the dependents would not be barred from bringing a claim for death benefits until two years from the time of the employee's death. The basis of this ruling was that "death claims are considered upon a separate basis"[231] from the benefits due the employee. This emphasizes the logical inconsistency of recognizing two separate rights of recovery in the *Harris* case for statute of limitations purposes and denying in *Proctor* the existence of two separate rights by applying res judicata—available only when there is just one right of recovery.

Nearly all the states faced with this problem clearly recognize two separate and independent rights of recovery. Here are samples. In an Arizona case the employee died as a result of an operation to correct a hernia supposedly suffered at work.[232] A claim for benefits was not filed within the period allowed for claim for hernia injuries. In holding

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[228]2 LARSON, WORKMEN'S COMPENSATION § 64.10, at 123, 125 (1952).

[229]Prentiss Truck & Tractor Co. v. Spencer, 228 Miss. 66, 87 So. 2d 272 (1956).

[230]187 So. 2d 886 (Miss. 1966).

[231]*Id.* at 888.

[232]Kay v. Hillside Mines, Inc., 54 Ariz. 36, 91 P.2d 867 (1939).

that the dependents were not bound by this statute of limitations, the court said "there are two independent and separate rights of recovery, although based on the same accident; the one of the workman during his lifetime, and the other of his dependents after his death. It follows, as a corollary, that the injured workman himself cannot waive, surrender nor compromise the right which was given by the law for the benefit of his dependents."[233] In a later case, that court said "that while findings and awards unappealed from are res adjudicata against both the employer and the injured workman who were parties to the award, they are not res adjudicata when dependents are endeavoring to establish their right to death benefits."[234]

The right of the dependents to death benefits "does accrue at the time of the accident, and everything must relate back to the situation at that time, but dependents have no standing or independent right of action while the workman is living. After his death they have such right of action, which, in that sense, does accrue after the death of the workman."[235] "The claim for compensation on behalf of the dependents is not derivative of the employee, but is an independent right of recovery for compensation created by the statute for the exclusive benefit of the dependents and over which the employee has no control and which he is powerless to release, waive, or extinguish."[236]

The best rule is that in all instances the employee, by litigation, settlement, release, or compromise, cannot destroy the right of his dependents to their statutory right of death benefits due to them under the Workmen's Compensation Act. The court's failure to adopt this rule may have been influenced by the prior settlement, but this is really irrelevant, especially when all the dependents were not represented in the settlement.

By using separate sections,[237] the act clearly creates separate rights—one for the employee, one for the dependents in case of his death. The act provides compensation for the injury only to the injured employee, who must file the claim and is free to use the compensation received for beer or butter. In the event the injured employee dies, only those dependents specified can get benefits under the act. It is only at the death of an employee that a right of recovery exists for the dependents. The

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[233] *Id.*, 91 P.2d at 870.

[234] Magma Copper Co. v. Naglich, 60 Ariz. 43, 131 P.2d 357, 360 (1942).

[235] Routh v. List & Weatherly Const. Co., 124 Kan. 222, 257 Pac. 721, 723 (1927).

[236] American Steel Foundries v. Industrial Comm'n, 361 Ill. 582, 198 N.E. 687, 690 (1935).

[237] Miss. Code Ann. § 6998-04 (Supp. 1964); Miss. Code Ann. § 6998-05 (1952).

dependents simply have no right of recovery until the death of the employee, so it is hardly fair to "res judicata" a right before it exists.

3. *Privity*

In applying the doctrine of res judicata to the facts in *Proctor*, the court also had to hold that privity existed between the injured employee and his dependents at the time of his unsuccessful litigation. The Mississippi common law rules do not support the finding of privity between the employee and his dependents in this situation.

In Mississippi "the essentials necessary to constitute res judicata are well settled by the decisions of this Court. They are (1) identity in the thing sued for; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in the persons for or against whom the claim is made."[238] This statement is from a negligence case in which Mrs. Palmer claimed she received injuries from the negligence of the hospital but was unsuccessful in her action. Mr. Palmer then filed suit for expenses incurred and for loss of consort arising from the personal injuries sustained by his wife. The court held that there was neither identity in the causes of action nor identity in the parties since Mr. Palmer was not a party in the first suit. Also no privity existed between the husband and wife. Thus, since in a suit for negligence the court had already denied the existence of privity between husband and wife, there is a hint of inconsistency in declaring privity to exist between an injured employee and his dependents, whose right of recovery was separate and did not exist until the death of the employee. The court did not rely on a possible distinction that when the second action follows the death, it may be said to be derived from the decedent. But even this distinction would not redeem the *Proctor* holding, because the death claim under the compensation act is so obviously a new and separate right.

The leading authority for the definition of privity in Mississippi is *Lipscomb v. Postell*,[239] cited and discussed in *H. Weston Lumber Co. v. Lacey Lumber Co.*[240] The definition of who are considered as parties and their privies is given as follows: Parties means

> all persons having a right to control the proceedings, to make defence [*sic*], to adduce and cross-examine witnesses, and to appeal from the decision, where appeal lies . . . .
>
> By the term privies, is meant those who stand in mutual or successive relationship to the same *rights of property*. And

[238] Palmer v. Clarksdale Hosp., 213 Miss. 611, 616, 57 So. 2d 476, 478 (1952).
[239] 38 Miss. 476 (1860).
[240] 123 Miss. 208, 85 So. 173 (1920).

> privies are distributed into several classes, according to the manner of this relationship. Thus there are privies in estate, as donor and donee, lessor and lessee, and joint-tenants; privies in blood, as heir and ancestor, and coparceners . . . .
>
> The ground upon which judgments bind those in privity . . . is that they are identified in interest . . . to the same right of property involved in the litigation.[241]

Although personal injury and death claims are not property rights, it is difficult to contrive a sound argument that the "same rights of property" are involved in the Proctor claims. That husband and wife are not in privity may be a rule of law, and surely where each has a separate statutory right of recovery, res judicata has no place.

In *Smith v. Kiel*,[242] the Missouri court said that to allow a settlement made by an injured employee to bind his dependents "would be a startling disregard of the law that a stranger to a suit or proceeding cannot be deprived of his property or rights without notice and opportunity to be heard. It would further invest the commission with jurisdiction over a subject-matter and parties not before it at the time the settlement was made."[243]

Strong v. Aetna Cas. & Sur. Co.[244] discussed the application of res judicata and privity in a similar fact situation. Strong filed suit for injury alleged to have occurred while at work. After extensive litigation the state supreme court denied his request. Strong died and his widow and children brought suit for death benefits. The carrier pled res judicata; the court rejected this defense on the grounds that privity was lacking between Strong and his dependents.

> Neither of them [the dependents] was a party thereto. Neither derives her nor his right by assignment, or, transfer, or, inheritance. The rights of Strong were statutory. The rights of these plaintiffs are statutory and separate from those of Strong. Strong had the right to compensation during his life. They are vested with statutory rights if his death was caused by a compensable injury.
>
> Res judicata and estoppel apply only against parties in the suit, or, those who are in privity with them. Privity is the mutual, or, succeeding relationship to the same right of property.
>
> . . . .
>
> The present plaintiffs have had no day in court. They do not

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[241] Lipscomb v. Postell, 38 Miss. 476, 489 (1860). (Emphasis omitted.)
[242] 115 S.W.2d 38 (Mo. Ct. App. 1938).
[243] *Id.* at 40.
[244] 52 F. Supp. 787 (N.D. Tex. 1943).

> enter now as his beneficiary, or assignee, *but in their own* right.[245]

These cases make it clear that the sensible rule is that privity is lacking between the holders of the two separate and distinct rights of recovery. The injured employee's right to compensation simply has no effect upon the dependents' right to death benefits. Because these are statutory rights and not successive legal relationships, privity does not exist between the holder of the first right (employee) and the holders of the second right (the dependents).

4. *Distinguished from Employer Relitigation*

In *Proctor,* the court confuses cases which say the *employer* cannot relitigate a decision on the employee's injury with cases in which the dependents, following the employee's death, are claiming their separate and distinct right of recovery. The first case[246] cited by the court is an example of this confusion. Card filed for compensation benefits and while the case was on appeal, he died. His wife, as administratrix, duly prosecuted his case to a final ruling by the Rhode Island Supreme Court. The court held that his injury was in the course of employment. Following this ruling, Card's widow filed for death benefits, and the employer contended that the prior claim in Card's name which established the compensable injury was not res judicata of any issue in the claim brought by the widow. The court held that the decision on the employee's injury is res judicata against the employer in a later claim filed by the dependents. The rationale was that the rights of recovery "are based upon one and the same cause of action, namely, the sustaining by the employee of a compensable injury. . . . Unless and until it is established that the employee suffered a compensable injury neither of them [employee or wife] is entitled to compensation. When once that fact is established the right to compensation for the injury accrues to the employee and if he dies of such injury it is in effect continued in favor of his dependent."[247]

In a similar New York case,[248] cited in *Proctor,* the employee's claim for compensation was contested on the ground that he was employed in interstate commerce at the time of the injury. This question was decided against the employer and compensation was granted. The employee died and his wife filed for death benefits. When the employer

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[245] *Id.* at 787-88. (Emphasis added.)

[246] Card v. Lloyd Mfg. Co., 82 R.I. 182, 107 A.2d 297 (1954).

[247] *Id.,* 107 A.2d at 299. (Emphasis omitted).

[248] Lanning v. Erie R.R., 265 App. Div. 576, 40 N.Y.S.2d 404 (1943), *aff'd mem.,* 291 N.Y. 688, 52 N.E.2d 587 (1943).

again attempted to relitigate the issue of interstate commerce, the court said the prior decision on this issue was res judicata against the employer.

> [T]he decedent's claim for disability compensation and his widow's claim for death benefits both spring from the same accident and injury and they must both stand or fall upon the determination of the issue of interstate commerce. . . . [The] two forms of benefits may flow from the same accident and injury. . . . [If the employee's] injuries result in his death, his widow and certain other dependents become entitled to death benefits. . . . Here this issue of interstate commerce has been tendered and tried. It has become res judicata and may not be retried as to each successive claimant.[249]

This rule that once a question has been decided against the employer, he cannot relitigate it against each dependent who has a statutory right, is not persuasive that in the reverse situation, *the dependent, who has never had a day in court,* is barred by a prior adjudication against the decedent. Except for the absence of a day in court, it may be policy rather than a logical application of legal rules that makes res judicata work against but not in favor of the employer. This rule is logical, and a Connecticut case nonchalantly explains that once the employee has established his right to compensation, the dependents are entitled to death benefits upon showing (1) the employee's death; (2) the dependency; and (3) the causal connection with the injury for which the employee was awarded.[250]

It is difficult to justify the *Proctor* result, and since the court in *Harris* recognized two separate rights of recovery, it is not unlikely that the court will overrule *Proctor* when it gets an opportunity.

XIV. Evidence

A. No Partial Waiver of the Dead Man's Statute

In *Lipson v. Lipson*[251] the court, by recognizing only a total waiver of the statutory exclusion, whittled further at the Dead Man's[252] Statute. The question was whether obtaining evidence by interrogatories from one incompetent to testify because of the statute was a waiver of the exclusionary effect of the statute, and, if so, whether the waiver was total or was applicable only to the one answering the interrogatories.

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[249]*Id.*, 40 N.Y.S.2d at 405-06.

[250]Biederzycki v. Farrel Foundry & Mach. Co., 103 Conn. 701, 131 Atl. 739 (1926).

[251]183 So. 2d 900 (Miss. 1966).

[252]Miss Code Ann. § 1690 (1956).

Another pertinent question is whether the waiver should have been limited to the scope of the interrogatories.

The testator executed a valid will leaving his entire estate to his two sons. The elder son was to receive three-tenths, the younger seven-tenths. Upon the death of the testator, the elder son filed suit in chancery court against the younger son and his family to make discovery of the testator's assets and to set aside certain transfers from the testator to the defendants. The trial court found that there had been a fiduciary relationship between the testator and younger son, that the inter vivos transfers by the testator would deprive the elder son of any benefit from the will, and that the younger son failed to present "clear" evidence of no undue influence. The trial court ordered the return to the estate of assets the defendants received from the testator before his death. The complainant had required the younger son (a defendant) to file sworn, written answers to interrogatories. At the trial the defendants attempted to put on testimony from each other to show that the other defendants were entitled to keep the assets instead of returning them to the estate. The chancellor ruled that all the defendants were incompetent to testify because of the Dead Man's Statute. The supreme court reversed the trial court and held that the complainant could force the answering of interrogatories by one otherwise incompetent to testify, but by so doing, the complainant waived the exclusionary effect of the statute as to all witnesses for the defendants. The waiver was complete, not limited to any particular witnesses or to the scope of the questions causing the waiver.

A leading case[253] cited by the Mississippi Supreme Court in support of its decision, held that a waiver of the privilege as to one party, waives it as to any and all parties. This is said to be a "well established" rule, at least where the adverse witness testified after the first witness, and on matters testified to by the first witness.[254] Some statutes[255] have special exclusionary provisions which prevent persons having claims against the estate from testifying unless designated persons who would protect the estate are examined in their own behalf. At least one state has recognized the waiver where the deposition of a witness, excluded by statute, was placed in the court file.[256] There is also a rule that the admission of statutorily excluded evidence is a waiver, although not objected to when offered.[257] Another jurisdiction has modified the total

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[253]Baker v. Baker, 363 Mo. 318, 251 S.W.2d 31 (1952). See generally Annot., 33 A.L.R.2d 1441 (1954).

[254]Annot., 33 A.L.R.2d 1441 (1954).

[255]*E.g.*, FLA. STAT. ANN. § 90.05 (1960).

[256]Wandel v. Wandel, 336 Mich. 126, 57 N.W.2d 468 (1953).

[257]Lisko v. Hicks, 195 Ark. 705, 144 S.W.2d 9 (1938).

waiver rule by limiting the waiver to testimony within the scope of the prior testimony.[258]

Mississippi has had several cases on the waiver of the exclusionary effect of the statute.[259] One of the earliest decisions[260] held that the exclusion was waived when evidence was obtained from an incompetent witness by the widow of the deceased in an attempt to prove certain transactions which occurred during the life of the husband. The widow objected to certain answers made by the witness. It was held that the witness was incompetent to testify about things occurring during the decedent's life which had a tendency to establish a claim against the estate, but, when the witness was questioned by the estate, the privilege was waived and the witness was competent. It has also been held[261] that when the complainants, in a suit to cancel a claim to land, were forced to answer a cross-bill under oath, the defendants waived the statutory incompetency of the complainants. One of the more recent cases[262] decided that the incompetency of a witness having a claim against an estate was waived, over the objection of his own attorney, when called by the party protecting the estate.

The *Lipson* decision relies on the recent case of *Coney v. Coney*,[263] a case in which two otherwise incompetent witnesses testified for the complainants, who were attempting to establish a claim against the property of the decedent. There was no objection by the defendant. When the defendants offered testimony in defense of the complainant's claim, it was objected to as being incompetent. The testimony was allowed by the trial court. The complainant's appeal from a dismissal of the complaint said the testimony should have been excluded. The Mississippi Supreme Court ruled that when the complainants questioned incompetent witnesses, they waived the privilege.

The *Coney* case can be understood as extending the waiver only to the scope of the testimony of the witness whose testimony caused the waiver. But there is no indication of any limitation in the *Lipson* case. The waiver is total—not limited by the scope of the testimony causing the waiver and not limited to any one or group of witnesses.

One very able chancellor commented that "section 1690 has caused more reversals of chancellors than probably any of our other statutes."[264]

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[258]Carter v. Curlew Creamery Co., 16 Wash. 2d 476, 134 P.2d 66 (1943).

[259]*E.g.*, Fant v. Fant, 173 Miss. 472, 162 So. 159 (1935); Coker, *Competency of a Defendant to Testify When Sued Under the Wrongful Death Statute*, 29 Miss. L.J. 258 (1958).

[260]Waldauex v. Parks, 141 Miss. 617, 106 So. 881 (1926).

[261]Stuckey v. Sallis, 221 Miss. 698, 74 So. 2d 749 (1954).

[262]Manning v. Hammond, 234 Miss. 299, 106 So. 2d 51 (1958).

[263]249 Miss. 561, 163 So. 2d 692 (1964).

[264]Letter from Bert H. Jones to John R. Bradley, July 28, 1966.

Doubtless, it has perplexed a few lawyers also. This decision should solve part of the difficulty trial judges and lawyers have had with the statute. There is a good argument that a limited waiver is more consistent with the exclusionary purpose of the statute, but this is another of the cases which has contributed to a general narrowing of the statute's effect. The Mississippi rule now clearly seems to be that there is no such thing as a partial waiver.[265]

B. Admissibility of Evidence With No Probative Value in Condemnation Case

Two witnesses testified for the state in a highway condemnation suit.[266] The testimony of one of the defendant's witnesses was excluded because it was based on sale of comparable land to the highway commission and on income value. One of the owners was the only other witness for the condemnees.

> Mrs. Magee said the value before the taking was 'between thirty and thirty-five thousand dollars,' and after the taking, 'about fifteen thousand dollars.' She appraised it for 'what it is worth to us.' She would not attempt to value the improved pasture land or timber land. She was asked how much loss in value her land had suffered as a result of the taking, to which she replied, 'I don't know.' She stated that she did not have 'any reasonable basis' for her opinion. Although we do not find error in permitting Mrs. Magee to testify, her testimony was of no value in determining damages.[267]

The jury verdict was for $15,000, and the only evidence with probative value would support a high of $4,410. The court reversed and remanded the case.

Persons not strictly experts are permitted to testify about damages to condemned land if they know the area and its land values.[268] These qualifications are interpreted to mean that the witness must be "more able to form an opinion on the subject at issue than citizens generally."[269] To safeguard the condemnor, this liberal allowance of testimony requires that the qualifications of a witness be determined prior to the introduction of the testimony on value.[270] There is no presumption of competency. It must be affirmatively shown that there is some basis for the witness'

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[265]See Note, 38 Miss. L.J. 156 (1966), for a discussion of the undue influence aspects of the instant case.

[266]Mississippi State Highway Comm'n v. Magee, 186 So. 2d 238 (Miss. 1966).

[267]*Id.* at 239.

[268]Am. Jur. *Eminent Domain* § 355 (1938).

[269]*Id.* at 999.

[270]*Ibid.*

opinion, and if there is a showing of only slight or remote knowledge, the testimony should not be admitted.[271] Further, the witness must be familiar with values before and after the taking, and "estimates of percentage of value lost, not based upon some substantial ground, should be excluded."[272]

Although the Mississippi Supreme Court has apparently adopted these generally accepted rules,[273] there is confusion about the competency of testimony on value of land in condemnation cases. An early Mississippi case[274] allowed the testimony of any competent witness having some knowledge of the value of the land. On cross examination the witness' knowledge was to be tested, determining the weight to be given his testimony. Subsequently a later case[275] established the owner's competency to testify on the value he would accept and a buyer would find reasonable, although the value of such testimony was questioned by the court. More recently, the court was stricter in holding that testimony of a witness who had little knowledge of the land prior to the taking should have been excluded, or at least stricken when the cross examination revealed the lack of competency.[276] Another recent opinion[277] excluding incompetent testimony said, "We know of no authority for the admission of opinion testimony on values when the witness states he does not know land values, and reason compels the rejection of such testimony."[278]

What good is a rule which admits evidence with no value? The rule should exclude testimony which has no value. The problem with admitting testimony but allowing it no weight is not clearly presented in the *Magee* case. In this case the jury's action was obvious. But the problems will arise when the verdict does not reveal whether weight was given to the nonvaluable testimony, as when there are other witnesses for the condemnee. To admit the nonvaluable testimony is more encouragement for the latent biases of the jury to control the verdict.

C. Physician-Patient Privilege

When the defendant offered as his witnesses two physicians who

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[271] *Ibid.*

[272] *Id.* § 356.

[273] See Mississippi State Highway Comm'n v. Kogexs, 240 Miss. 529, 128 So. 2d 353 (1961).

[274] Board of Levee Comm'rs v. Dillard, 76 Miss. 641, 25 So. 292 (1899).

[275] City of Clarksdale v. Stuart, 184 Miss. 179, 185 So. 588 (1939).

[276] Mississippi State Highway Comm'n v. Rogers, 240 Miss. 529, 128 So. 2d 353 (1961).

[277] Mississippi State Highway Comm'n v. Ladner, 243 Miss. 278, 137 So. 2d 781 (1962).

[278] *Id.* at 284, 137 So. 2d at 783.

had treated the plaintiff for her injuries, the plaintiff's objection, based upon the statutory privilege,[279] was sustained. The supreme court said the ruling was erroneous,[280] for when the patient, on direct examination, testified in detail about her injuries and the treatment by certain physicians, she waived her privilege of preventing those physicians from testifying.

The statutory privilege can be waived, but the basis for the waiver, although its effect may be unintended, must be voluntary.[281] A patient waives the privilege by testifying on direct examination about the treatment received. Such testimony is voluntary. This is distinguished from new testimony given on cross examination, which, not being voluntary, does not cause a waiver.[282]

Earlier, the Mississippi Supreme Court appeared reluctant to recognize a waiver which was not clearly intended by the patient. An example is that a patient's introduction of a physician who testified about facts also known by the patient's personal physician was not a waiver of the privilege extending to the personal physician.[283] This strict interpretation against waiver controlled even when there had been a joint examination and some of the physicians who examined the patient had testified.[284] This apparent reluctance did not prevent the court from accepting the rule that a voluntary display to the jury of the patient's injury or scar is a waiver of the privilege, allowing the other party to have its physician examine the patient and testify about his findings.[285]

The more recent cases fluctuate between an easily found waiver, as when the patient exhibited the injury or scar,[286] and a strict nonwaiver rule, as when a patient's testimony about the treatment prescribed by the physician was not a waiver.[287] In the latter case, the court refused to accept the testimony as an express or implied waiver. Again in liberal vein, a recent decision admitted the reports and letters of the patient's personal physician because another physician's testimony was based partly on the records.[288] However, there is a remark in the decision that the admissibility of the records should not be construed as a waiver

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[279]Miss. Code Ann. § 1697 (1956).

[280]Dennis v. Prisock, 181 So. 2d 125 (Miss. 1965).

[281]See Am. Jur. *Witnesses* § 447 (1948); 97 C.J.S. *Witnesses* § 310(c) (1957); Annot., 12 A.L.R. 798 (1920).

[282]97 C.J.S. *Witnesses* § 310(c) (1957).

[283]United States Fid. & Guar. Co. v. Hood, 124 Miss. 548, 87 So. 115 (1921).

[284]Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921).

[285]Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 170 So. 686 (1936).

[286]See generally Lipscomb, *Privileged Communications Statute—Sword or Shield,* 16 Miss. L.J. 181 (1944).

[287]Bryan Bros. Packing Co. v. Grubbs, 251 Miss. 52, 168 So. 2d 289 (1964).

[288]City of Laurel v. Upton, 253 Miss. 380, 175 So. 2d 621 (1965).

which would allow the testimony of the physician who wrote them.[289]

This case gives us a new rule, probably reflecting the trend toward more easily found waivers, the trend being part of the notion that a trial should be a display of all relevant evidence instead of a hide-and-seek game encouraged by privileges coming from another era.

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[289] *Ibid.*

Appendix A.

Mississippi Supreme Court's Statistics on Its 1965-66 Term*

The compilation and interpretation of judicial statistics are vital parts of the fair, efficient, and businesslike administration of justice. The State of Mississippi will spend at least $2,800,635 for the biennium of 1966-1968 on operation of its courts. This figure does not include the substantial costs of operating the separate and independent offices of the chancery, circuit, and supreme court clerks. The size of these aggregate expenditures and the essential nature of the courts in our system of government assuredly indicate the need for up-to-date statistical studies of the work of all courts. Although most of the states have them, there are no statutory provisions of this nature in Mississippi. Factual, statistical analysis of judicial work includes case load, types of cases, methods of disposition, periods required from submission to decision, and in appellate courts, the number of written opinions, dissents, concurrences, per curiam decisions, and other relevant facts.

For a number of years the Supreme Court of Mississippi has maintained for its own information rather limited statistics on each term of the court. Beginning with September 1964, the court has compiled more detailed facts on its work load and cases. However, the attached tables are the first publication of statistics of the court.

Mississippi Code section 1942 provides that two terms of the supreme court shall be held in each year, to commence on the second Monday of September and the first Monday of March. The court has customarily recessed on the second Monday of June for a short term in early July, and then adjourned sine die until the second Monday of September. That practice was followed in the 1965-1966 term, to which these statistics apply. The court convened on the second Monday of September 1965, and was in session continuously, including the March term, until June 13, when it recessed until July 6, and adjourned sine die on July 8, 1966.

The following statistics are not as comprehensive or informative as they should be in future years. Additions of other factors and more interpretation in depth will make later compilations more meaningful and helpful to the judges in the administration of the court's business and to the bar and general public. However, the three tables which are printed in this report and the comments about them should be of interest. Credit for much of the work in compilation of these statistics should go to the two outgoing law clerks of the court, Mr. William Dye, now of Indianola, and Mr. David Webb, Jr., now of New Orleans.

The court sits in two divisions or groups, of five judges each, with varying judges alternating between the two groups, presided over respectively by the Chief Justice and Presiding Justice. In the event of a difference of opinion within the group, the case is carried to the regular weekly en banc conference.

Statistics do not mean much without interpretation. Many facts do not appear on the face of these tables. For example, one of the cases

had a record of eighty-two bound volumes of testimony and evidence, and extensive briefs. Many other cases, each classified as only one, involved records of many volumes, ranging from five to twelve, and extensive briefs. Further, it is a truism among the judges, expressed wryly and half-humorously, that often the smallest records present the most difficult questions for decision.

Case-load and Disposition

The work-load of the court for 1965-66 included 279 appeals from the circuit courts and 97 from chancery court, for a total of 376 cases. Of the 279 appeals from the circuit court, 155 were affirmed and 124 reversed. The percentage of circuit cases reversed was 44.4% Of the 97 cases appealed from the chancery court, 60 were affirmed and 37 were reversed. The percentage of chancery cases reversed was 38.1%. The percentage of cases reversed from both courts was 43% (42.8%).

The highest percentage of cases in the broad categories on Table No. 1 "reversed" was in "Domestic Relations," with 56% of the cases being reversed. The broad category with the next highest percentage of reversals was "Eminent Domain," with 54% of the cases being reversed. The broad category with the least number of reversals was "Real Property," with 31% of the cases being reversed. One-half of the cases reversed for excessive damages were eminent domain cases.

Excluding workmen's compensation, of the 145 cases reversed, 28 were attributable to the weight of the evidence, 16 were reversed due to erroneous instructions, 8 due to inadmissible evidence, 15 due to errors in procedure, 18 due to an excessive or inadequate amount of damages awarded, and 60 due to the application of the law.

Sixteen workmen's compensation cases were reversed, representing 40% of the cases. Thirteen were reversed on the substantial evidence rule, one because of errors in procedure, and two on the law.

Description of Tables

Table No. 1 shows a breakdown of the work-load of the court by the type of case. The reversal of each type of case is further broken down as to the kind of reversible error. In many cases there was more than one reversible error, but only the main error or the principal reason for reversal is shown. The classification "other," under the heading "Type of Case," includes criminal cases other than felonies, trust cases, will cases, Public Service Commission cases, all tort cases other than personal injury and property damage, writ of mandamus cases, zoning cases, etc. (See Table No. 2).

The classification "Wt. of Evidence," under the heading "Reason for Reversal," indicates that the finding of fact upon which liability or non-liability is based was not supported by sufficient evidence. It does not include the amount of damages awarded. The classification "Evidence" indicates the admission of inadmissible evidence. "Procedure" indicates errors such as jurisdiction and venue. Reversal for "Damages" means reversal because of excessive or inadequate damages; affirmance with remittitur is considered reversal for damages. The classification "law" includes any type of misinterpretation of the law by the trial judge,

erroneous granting of peremptory instruction, erroneous refusal to give a peremptory instruction, misinterpretation of written contracts or insurance policies, violation of constitutional rights, etc. The classification "Substantial Evidence" applies only to workmen's compensation cases and indicates that the order of the commission was reinstated because there was substantial evidence to support it.

Table No. 2 is a breakdown of the "other" classification in Table No. 1.

Table No. 3 is a classification of the cases according to the time required for decision, and the number and percentages of cases affirmed or reversed.

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*The comments and statistics of Appendix A were furnished by W. N. Ethridge, Jr., Chief Justice of the Mississippi Supreme Court.

TABLE NO. 1
REASON FOR REVERSAL
1965-1966

Type of Case	*Total*	*Aff'd*	*Rever.*	*% Rever.*	*Wt. of Evidence*	*Inadmissible Instruction*	*Inadmissible Evidence*	*Proc.*	*Damages*	*Law*	*Sub. Evid.*
CONTRACTS	47	32	15	32%	1	0	0	3	1	10	0
CRIMINAL***	48	24	24	50%	1	2	5	1	0	15	0
DOMESTIC RELAT.	16	7	9	56%	2	0	0	5	0	2	0
EMINENT DOMAIN	24	11	13	54%	2	1	1	0	9	0	0
INSURANCE	21	11	10	48%	0	1	0	0	0	9	0
PERSONAL INJ.	54	32	22	41%	6	8	2	0	4	2	0
PROPERTY DAM.	21	14	7	33%	1	3	0	0	1	2	0
REAL PROPERTY	20	13	7	31%	2	0	0	0	0	5	0
WORKMEN'S COMP.	40	24	16	40%	0	0	0	1	0	2	13
OTHER	85*	47	38	45%	13	1	0	6	3	15	0
TOTALS	376*	215**	161*	43%	28*	16	8	16	18	62	13

*This figure includes 7 breach of peace cases which were consolidated, heard as one, and controlled by one opinion.

**This figure includes 53 cases which were affirmed per curiam with no opinions.

***This does not include criminal non-felony cases. See Table No. 2.

TABLE NO. 2

BREAKDOWN OF CLASSIFICATION "OTHER" SHOWN IN TABLE NO. 1

1965-66

Type of Case	*Total*	*Aff'd*	*Reversed*	*Wt. of Evid.*	*Instruct*	*Proc.*	*Damages*	*Law*
CRIMINAL (NON-FELONY)	22	7	15	11	1	1		2
ATTACHMENT	3	2	1					1
MANDAMUS	4	3	1			1		
TORTS (OTHER THAN PER. INS. AND PROP. DAMAGE)	8	4	4				3	1
HABEAS CORPUS	3	3						
PUB. SER. COMM.	6	4	2	1				1
ZONING	2		2	1				1
INJUNCTION	7	5	2					2
WILLS & ESTATES TRUSTS	11	8	3					3
LOCAL & COUNTY BOARDS	9	8	1					1
WRIT OF ERROR CORAM NOBIS	2		2			2		
MISC.*	8	3	5			2		3
TOTAL	85	47	38	13	1	6	3	15

*The ten cases under misc. are as follows: (1) Bill of Review; (2) wage and hour; (3) transfer of case from circuit to chancery; (4) circuit ct. denied cert.; (5) replevin; (6) quo warranto; (7) interlocutory appeal; (8) motion to set aside judgment.

TABLE NO. 3

WEEKS FROM SUBMISSION TO DECISION

1965-1966

	Two	*Three*	*Four*	*Five*	*Six or More*	*Total Cases*	*Total Affm'd*	*Total Reversed*	*% Reversed*
TOTAL CASES	130	107	59	26	54	376	215	161	43%
PERCENTAGE	35%	28%	16%	7%	14%				
CUMULATIVE		63%	79%	86%	100%				

APPENDIX B.

Unofficial Statistics by Circuit and Chancery Districts

Circuit Court *District*	*Aff'd*	*Rev'd*	*Chancery Court* *District*	*Aff'd*	*Rev'd*
1	14	9	1	5	1
2	14	6	2	8	5
3	6	7	3	2	1
4	13	11	4	4	0
5	5	2	5	9	7
6	2	4	6	3	1
7	28	17	7	2	2
8	11	7	8	11	4
9	8	7	9	5	4
10	13	5	10	2	4
11	5	3	11	2	0
12	6	8	12	6	2
13	8	13	13	0	0
14	9	4	14	5	1
15	4	2	15	0	0
16	4	3	16	5	1
17	4	1	17	2	2
18	11	5	18	2	2
19	17	6		—	—
	—	—		73	37
	182	120			

If a case was partly affirmed and partly reversed, these figures, in the best sporting tradition, give a tally to affirmed and reversed. This caused many cases to be counted twice, obviously increasing the total number of cases. Because of this different method of counting such cases, these totals do not agree with the supreme court's figures.

THE CRIMINAL VERSUS SOCIETY: SOME OBSERVATIONS ON THE ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED" DUE PROCESS†

*Parham H. Williams, Jr.**

PART II: THE NEW CODE OF CUSTODIAL INTERROGATION

"No person shall . . . be compelled in any Criminal Case to be a witness against himself . . . ."[114]

"In all criminal prosecutions the accused shall . . . not be compelled to give evidence against himself . . . ."[115]

In the closing days of the October Term, 1965, the United States Supreme Court rendered a group of decisions characterized by dissenting Justice Harlan as creating a "new constitutional code of rules for confessions."[116] The impact of *Miranda v. Arizona*[117] and the related decisions[118] on the criminal procedure of the American state jurisdictions will undoubtedly be of revolutionary proportions. Although the Court, speaking through Mr. Chief Justice Warren, stated that in *Miranda* it was but "applying principles long recognized and applied in other situations," most objective viewers are inclined to agree with the dissenting Mr. Justice White, who observed that:

> the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy . . . .[119]

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† This article was commenced at 37 MISS. L.J. 353 (1966), and will be continued in the March 1967 issue.

* Professor of Law, University of Mississippi.

[114]U.S. CONST. amend. V.

[115]MISS. CONST. art. 3, § 26.

[116]Miranda v. Arizona, 86 Sup. Ct. 1602, 1643 (1966) (Harlan, J., dissenting).

[117]86 Sup. Ct. 1602 (1966).

[118]The *Miranda* opinion, rendered on June 13, 1966, also decided three other cases involving the same problem: *Vignera v. New York*; *Westover v. United States*; and *California v. Stewart*. One week later, the Court, in Johnson v. New Jersey, 86 Sup. Ct. 1772 (1966), held that the rules enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 86 Sup. Ct. 1602 (1966), would not be applied retroactively, but would only be available to persons whose trials began after the date of those decisions.

[119]Miranda v. Arizona, 86 Sup. Ct. 1602, 1657 (1966) (White, J., dissenting).

The *Miranda* decision is indeed innovative, for therein the Court formulates a specific constitutional code applicable to the interrogation of arrestees by law enforcement officials.

The idea of a court "legislating" a code of procedure is deeply disturbing to many who treasure the notion that the concept of "separation of governmental powers" still possesses a modicum of viability. Indeed, the courts themselves are often zealous in their protection of this concept and are quick to point out that they are guardians rather than destroyers of the system. A typical state-court reaction is voiced in *State v. Wood*[120] wherein the Mississippi court was asked to declare that, because of the repugnancy existing between the prohibition law[121] and the pertinent tax statutes,[122] the prohibition law had been impliedly repealed. In rejecting this contention, the court emphasized its position by the following statement on judicial legislation:

> An insidious notion, gaining in popularity, that holds capacity for serious mischief to our governmental structure is a view of the judicial function, which is that all the maladjustments, deficiencies, or dissensions in our society which have failed of correction by other means should find a panacea in the courts. Conceding, as is vehemently argued by appellee, that the liquor situation in Mississippi is verily a social problem which may have been poorly managed and fraught with hypocrisies, and that corrective measures may be sorely needed, nevertheless, this Court will not yield to the temptation, however attractive it may appear, to attempt the correction of the problem and do by judicial fiat that which the Constitution as well as the best tradition of our system of jurisprudence sternly forbids this Court to do.
>
> Therefore, we emphatically decline to usurp legislative prerogative and repeal or modify the statutory law of this State relating to liquor.[123]

Rare indeed is the court which openly announces that it is stepping into the legislative arena and is prepared to exercise the functions of that branch of government. In fact the usual appellate opinion, though not so articulate as that in *Wood,* is couched in terms which tend to obscure any judicial lawmaking inherent in the decision. The tradi-

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[120]187 So. 2d 820 (Miss. 1966).

[121]Miss. Code Ann. § 2613 (1956).

[122]Miss. Code Ann. § 10112 (1956); Miss. Code Ann. §§ 10115, 10147-03(b), 10147-10 (Supp. 1964).

[123]State v. Wood, 187 So. 2d 820, 831-32 (Miss. 1966). For a similar disavowal of any power or inclination to legislate judicially see State v. Hall, 187 So. 2d 861 (Miss. 1966).

tional appellate opinion recites the facts and circumstances of the case, explains the existing doctrines of law which are relevant, and then, cautiously emphasizing that nothing startling or new is involved in its choice, chooses and applies one of the existing doctrines to dispose of the case. *Miranda,* however, is patently cast in a different mold. In form, the opinion more nearly resembles a legislative committee report than a traditional appellate decision. It begins by identifying a major problem of general concern; it then conducts an exhaustive investigation into the police practices that have engendered the problem; and finally it carefully prescribes a detailed code of procedure to govern a class of officials which is not a party to the litigation—the police. As an afterthought at the end of the opinion the Court considers in a rather summary fashion the four cases which afforded it the opportunity to legislate.

That *Miranda* is at variance with common law legal history, represents a departure from a hoary lineage of precedent, and constitutes an overt judicial invasion of the legislative function does not for a moment undermine its impact upon the law enforcement process. Rather, the demonstrated willingness of the Court to exercise a law-making power and the uncertainties surrounding the future wielding of that power will add dimension to the impact. Whatever else the decision may imply, *Miranda* and its "code" of procedure will have an immediate and pervasive influence upon police practices and, to an as yet unknown degree, upon the effectiveness of the police in protecting society from criminal depredations.

The reactions of law enforcement personnel to the announcement of this new "code" were predictably critical. New York City Police Commissioner Howard J. Leary argued that "there is being developed sophisticated law for an immature society . . . ,"[124] and Memphis Police Chief J. C. Macdonald complained that "with this added burden it's going to be next to impossible to investigate serious crimes."[125]

Although stunned momentarily by the broad sweep of the decision, many newspapers recovered sufficiently by June 15, 1966, to lash out editorially against the Court. The *Memphis Commercial Appeal* of that date is typical. In an editorial entitled "Let the People Speak," the writer harangued:

> If this [*Miranda*] is the law of the land, it is dangerous. This is what drove other nations into fascism. A country taken over by the ungodly reacts fanatically and in extremism. This we do not want in America. Yet this is what the Supreme Court invites

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[124]Time, June 24, 1966, p. 54.

[125]Commercial Appeal, June 14, 1966, p. 1, col. 5.

> by its faulty reading of the Constitution and its warped understanding of justice.[126]

Perhaps the unkindest cuts of all, however, were directed at the five-man majority by two of the dissenting justices. "Reddening with anger and pounding his fist on the desk before him"[127] while reading his dissent, Mr. Justice Harlan said:

> I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large.[128] Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities.[129]

And Mr. Justice White, predicting that as a result of the application of the new "code" many criminals will escape punishment, avowed:

> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.[130]

By no means, however, was the response to the *Miranda* decision uniformly critical. Although less dramatically portrayed by the news media, many law enforcement officials indicated that the new "code" differed little from the procedures followed by their respective agencies. In Wayne County, Michigan, the county prosecutor commented, "so far as we are concerned there is absolutely nothing new in this decision,"[131] and a New York District Attorney said the ruling appeared to require "exactly what we are doing already."[132] A spokesman for the Interna-

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[126]Commercial Appeal, June 15, 1966, p. 6, col. 2.

[127]Time, June 24, 1966, pp. 53, 54.

[128]Miranda v. Arizona, 86 Sup. Ct. 1602, 1643 (1966) (Harlan, J., dissenting).

[129]*Id.* at 1654.

[130]*Id.* at 1663 (White, J., dissenting).

[131]N.Y. Times, June 14, 1966, § C, p. 25, col. 6.

[132]*Id.* col. 7. Eloquent support for the *Miranda* decision is voiced in Edwards,

tional Association of Chiefs of Police added: "This isn't so earth-shaking; most professional police officers in this county have long felt that you should advise a suspect of his right to remain silent and to have counsel."[133]

But the most persuasive argument in support of the new ruling is grounded on the exemplary law enforcement record of the Federal Bureau of Investigation which, for more than a decade, has followed a procedure similar to that outlined by the Court. In 1952, Bureau Director J. Edgar Hoover wrote:

> Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice.[134]

For most state law enforcement agencies, however, the application of the new "code" will indeed require a revolutionary revamping of interrogation procedures. In its requirement of specific warnings concerning constitutional rights prior to any interrogation of an arrestee, *Miranda* imposes a procedure foreign to the practice of most state police organizations.[135] The task of accommodating to these new procedures must occupy the energies and best efforts of not only our police personnel, but also of all who are vitally interested in the effectiveness of law enforcement.

A. The Legislative History of the New Code

The five-man majority which formulated the *Miranda* "code" apparently assumed that state legislative bodies had defaulted in their responsibility of developing codes of criminal procedure which would adequately guarantee the rights of "due process" and of "equal protection of the laws" against arbitrary state action. As indicated in the Introduc-

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Miranda—The Death Knell to the Old-Time "Cop," Trial, Aug.-Sept. 1966, p. 14; Wright, *The Right to Counsel: Fact or Fiction?*, Trial, Aug./Sept. 1966, p. 15.

[133]N.Y. Times, June 14, 1966, § C, p. 25, col. 6.

[134]Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 182 (1952).

[135]Most state law enforcement agencies have been more than happy to abide by the general rule that a voluntary extrajudicial confession is not rendered inadmissible because no caution or warning was given the accused that the confession might be used against him, or because he was not advised of his constitutional rights to remain silent and to consult with counsel. 23 C.J.S. *Criminal Law* § 822, at 203-04 (1961).

tion[136] to this article, there has indeed been a law-making vacuum into which the Court, the least equipped branch of the government to lay down specific rules of procedure, has had to move. Particularly has this been true in the sticky area of extrajudicial confessions. In an effort to guard against abuses of police power during in-custody interrogations of arrestees, the Court as early as 1936, in the unfortunate case of *Brown v. Mississippi*,[137] wrote "new law" by voiding for want of due process a state court conviction based on a coerced confession. Having established the principle that the due process clause of the fourteenth amendment could be invoked to protect defendants in state courts from the effects of coerced confessions, the Court then proceeded, in a long line of decisions extending down to 1963,[138] to exercise its "responsibility of making our own examination of the record"[139] in state cases presenting the question of whether a confession was properly admitted into evidence. As police methods throughout the country became more sophisticated, the interrogation procedures used to secure confessions in the cases before the Court evolved from the brutal beating in *Brown* to the refined psychological pressures evident in *Spano v. New York*[140] and *Rogers v. Richmond*.[141] The Court had little difficulty in extending

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[136]37 Miss. L.J. 353, 357-59 (1966).

[137]297 U.S. 278 (1936). It is indeed unfortunate that *Brown* should have been the vehicle for the first extension of the due process clause to state confession problems, for the evidence concerning extortion of the confession is no credit to the state of Mississippi. It appeared from the record that a deputy sheriff, accompanied by others, took one of the defendants to the scene and accused him of the crime (murder). "Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped . . . . The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial." Brown v. Mississippi, 297 U.S. 278, 281 (1936).

It was even more unfortunate that the Mississippi Supreme Court affirmed the conviction on such a record. According to Professor McCormick, however, the courageous dissent of Judge Griffith was influential in causing the grant of certiorari by the United States Supreme Court. McCormick, Evidence § 117, at 242 (1954).

[138]Chambers v. Florida, 309 U.S. 227 (1940); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (defendant was not beaten but was grilled from 7:00 p.m. Saturday until 11:00 a.m. Monday when he confessed the murder); Spano v. New York, 360 U.S. 315 (1959) (no beating but combination of official pressure, fatigue, and sympathy falsely aroused in defendant led to his confession); Rogers v. Richmond, 365 U.S. 534 (1961) (no beating but officer's threat to involve arrestee's wife led to confession); Haynes v. Washington, 373 U.S. 503 (1963) (police threat to hold arrestee incommunicado led to confession).

[139]Spano v. New York, 360 U.S. 315, 316 (1959).

[140]360 U.S. 315 (1959).

[141]365 U.S. 534 (1961).

the reach of the due process clause to embrace the new forms of coercion. In *Rogers* it said:

> Our decisions under that Amendment [the fourteenth] have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offended an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[142]

In all of the state confession cases handled by the Court since *Brown*, the fourteenth amendment due process clause had provided the constitutional basis for federal intervention. In 1964, however, the Court made a dramatic shift to a new constitutional basis—the sixth amendment right-to-counsel guaranty. The general principle that the sixth amendment guaranty, operative through the fourteenth amendment due process clause, entitled a state court felony defendant to counsel during the trial process had been established the year before in *Gideon v. Wainwright*.[143] Only a judicial hop-skip-and-jump was necessary for the Court, in *Escobedo v. Illinois*,[144] to extend the sixth amendment guaranty to the interrogation process in certain limited fact situations. In *Escobedo* the Court was confronted with a case wherein the police, during interrogation, denied Escobedo's request to speak to his retained attorney and prevented his attorney, who had come to the police station, from consulting with Escobedo. After four hours of questioning, during which the attorney cooled his heels in the precinct station lobby, Escobedo confessed. Spurred by this indefensible police conduct, the Court abandoned the voluntary-involuntary test for admissibility of confessions and rather cautiously fashioned a sixth amendment formula which was apparently limited to factual situations similar to those of *Escobedo*.

> We hold . . . that where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his

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142Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).
143372 U.S. 335 (1963).
144378 U.S. 478 (1964).

> lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment . . .' and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[145]

Although the *Escobedo* opinion apparently limited the applicability of the new rule to fact situations wherein the police investigation had "focused" on a particular suspect who had additionally requested and been denied the opportunity to consult with his lawyer, the "legislative intent" of the Court was unclear. As a consequence, the succeeding two years produced a variety of diverse and conflicting opinions from the state and lower federal courts concerning the expanse of the *Escobedo* rule. Most of these courts, believing that *Escobedo* was in fact grounded on a finding of actual coercion, chose to apply a narrow interpretation to the decision, and continued to weigh the facts in the individual cases in the balances of the "voluntary-involuntary test." Typical is the holding of the Illinois Supreme Court in *People v. Hartgraves*[146] that the police did not have to advise an accused of the right to remain silent or the right to counsel and that the rule in *Escobedo* was limited to a situation where the accused specifically requested the assistance of counsel.[147]

The other side of the interpretative coin was typified by the California decision in *People v. Dorado*,[148] holding that the police must clearly and specifically advise the arrestee of his right to remain silent and of his right to consult with a lawyer prior to any interrogation.[149]

The ambiguity of the *Escobedo* opinion and the rampant speculation on its range and desirability tended to create a state of mild procedural anarchy which the Court could not long tolerate.[150] Therefore, in late 1965, the Court granted certiorari[151] in four cases[152] dealing with the

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[145]Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

[146]31 Ill. 2d 375, 202 N.E.2d 33 (1964).

[147]For similar interpretations see Edwards v. Holman, 342 F.2d 679 (5th Cir. 1965); Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964); State v. Miranda, 98 Ariz. 18, 401 P.2d 721 (1965); State v. Carter, 181 So. 2d 763 (La. 1966); Phillips v. State, 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

[148]62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

[149]Other decisions requiring a police warning of constitutional rights prior to interrogation are: United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965); State v. Long, 179 Neb. 606, 139 N.W.2d 813 (1966).

[150]The questions raised but not solved by *Escobedo* are enumerated in 36 Miss. L.J. 247 (1965).

[151]382 U.S. 937 (1965); 382 U.S. 925 (1965); 382 U.S. 924 (1965).

[152]Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Miranda v.

admissibility of statements obtained from individuals subjected to custodial police interrogation. Review was granted, according to Mr. Chief Justice Warren, in order "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, *and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.*"[153]

With the stage thus set, the enunciation by the Court of a new code of in-custody interrogation procedure should have surprised no one. *Miranda* was the logical destination of a judicial voyage which included such ports of call as *Brown, Spano, Massiah,*[154] and *Escobedo.*

B. The Cases

The vehicles which bore the new "code" on its inaugural parade were four widely disparate criminal cases,[155] united by only the common fact that the confession obtained from the defendant in each was valid under the then existing test. This test, developed by the Court through a painstaking process of individual case analysis over a period of thirty years, simply inquired whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer,"[156] and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed."[157] In none of the four cases did the defendant even claim that his confession was inadmissible because of coercion in the traditional due process sense. Rather, the claims of the four petitioners that their respective confessions were inadmissible were grounded on an assumption not hitherto accorded respectability by the Court—that the fifth amendment requires an effective pre-interrogation warning of the suspect's right to remain silent and to consult with counsel.

1. *Miranda v. Arizona*

On March 13, 1963, Ernesto Miranda was arrested at his home in

Arizona, 98 Ariz. 18, 401 P.2d 721 (1965); People v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); People v. Vignera, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965).

[153]Miranda v. Arizona, 86 Sup. Ct. 1602, 1611 (1966). (Emphasis added.)

[154]Massiah v. United States, 377 U.S. 201 (1964). *Massiah,* involving a federal rather than a state court conviction, held that the fifth and sixth amendments operate to prohibit the use in evidence of any statements obtained from a defendant *after* indictment and in the absence of his retained counsel.

[155]Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Miranda v. Arizona, 98 Ariz. 18, 401 P.2d 721 (1965); People v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); People v. Vignera, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965).

[156]Lisenba v. California, 314 U.S. 219, 241 (1941).

[157]Haynes v. Washington, 373 U.S. 503, 513 (1963).

Phoenix, Arizona, and taken to the police station for interrogation concerning the forcible rape of an 18-year-old girl which had occurred ten days before. Miranda was 23 years old, indigent, and had completed the eighth grade. A subsequent psychiatric report indicated that he was "alert and oriented as to time, place, and person,"[158] of normal intelligence, competent to stand trial, and legally sane. After the victim had identified Miranda in a lineup, he was taken into an interrogation room and questioned by two police officers. The questioning lasted no more than two hours and there is no suggestion whatsoever that any coercion, either physical or psychological, was employed by the officers. Shortly after noon, the officers emerged from the interrogation room with a written confession bearing Miranda's signature. It is interesting to note that the confession was apparently written on a form used for that purpose, for at the top of the paper was a typed paragraph stating substantially that the confession was made voluntarily without force or threats or promises of immunity, and "with full knowledge of my legal rights, understanding any statement I make may be used against me."[159]

However, the testimony of the officers at the trial indicated that Miranda was not advised prior to interrogation of his right to consult with an attorney nor was he effectively warned of his right to remain silent. Without such warnings, said the Supreme Court, the confession was inadmissible against Miranda. The Court attached no significance to the typed paragraph containing the statement that the prisoner had "full knowledge" of his "legal rights." The mere fact that he signed a statement containing such a clause, said the Court, "does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[160]

2. *Vignera v. New York*

Three days after the robbery of a Brooklyn dress shop, Michael Vignera was picked up by New York police and taken to a precinct station for questioning concerning the robbery. Shortly after the interrogation began, Vignera orally confessed to the questioning detective. Vignera was then identified by two victims of the robbery and, about 3:00 p.m., was formally arrested for the crime. At 11:00 p.m. he was questioned by an assistant district attorney and again confessed, this second statement being reduced to writing. At the trial, both the oral confession and the subsequent written one were introduced into evidence. There was no evidence in the record, however, which indicated in any

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[158]Miranda v. Arizona, 86 Sup. Ct. 1602, 1651 (1966).

[159]*Id.* at 1637.

[160]*Ibid.*

way that Vignera was warned prior to the interrogation of his right to counsel and to remain silent. The two confessions were inadmissible, said the Court, because the prisoner "was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present . . . ."[161]

3. *Westover v. United States*

About 9:45 p.m. on the evening of March 20, 1963, Carl Calvin Westover was arrested by Kansas City police and charged with two local robberies. Westover was interrogated by the police for a short time that night and again throughout the following morning. At noon, three FBI agents continued the questioning at the Kansas City Police Department, this time in regard to two robberies in Sacramento, California. After approximately two hours, Westover signed separate confessions to each of the California robberies. As in *Miranda,* the forms on which the confessions were written contained a printed statement that the agents had advised Westover that he did not have to make a statement, that any statement he made could be used against him in a subsequent trial, and that he had the right to consult an attorney before making any statement. In addition to this, when Westover was later tried for the California robberies, one of the FBI agents testified specifically that the required warnings had been given Westover at the outset of the FBI interrogation. The record, however, indicated that Westover had never been given any warning as to his rights by the Kansas City police.

In view of the total situation, the Court said that it could not find that Westover had made an intelligent and knowing waiver of his right to remain silent and to consult with counsel prior to making any statement. Justifying this conclusion, the Court said:

> At the time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning . . . . Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.[162]

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[161] *Id.* at 1638.

[162] *Id.* at 1639.

4. *California v. Stewart*

On January 31, 1963, Los Angeles police arrested Roy Allen Stewart in connection with a series of purse-snatch robberies. During the ensuing five days, the suspect was interrogated by the police on nine different occasions before he finally confessed. The confession was admitted against Stewart at his trial, but the record does not indicate whether he was advised of his right to remain silent or of his right to counsel.

Following Stewart's conviction, the Supreme Court of California reversed on appeal, holding that under *Escobedo,* the police were required to advise a suspect of his constitutional rights prior to in-custody interrogation. The United States Supreme Court affirmed, declaring that a silent trial record will not support a presumption that the defendant was effectively advised of his rights or that he made a knowing and intelligent waiver of those rights.[163]

C. The Societal Context of the Code

In its development and application of the "voluntariness" test in the confession cases from *Brown* to *Escobedo,* the Court had been largely unconcerned with police interrogation practices in general. The case-by-case approach permitted the Court to focus on the particular interrogation procedure in the case at bar and allowed in each instance a determination that *this* confession was coerced because of certain enumerated illegal practices unique to *this* case. In order to justify the formulation of the *Miranda* "code," however, the Court was compelled to glean a broader field than that presented by the limited fact situations of each of the four cases. Therefore, the Court sought first of all to identify the factual context within which American law enforcement agencies conduct in-custody interrogation practices.

The Court's quest for an understanding of the nature and setting of in-custody interrogation was substantially hampered by the rather surprising lack of published information concerning the practice. This dearth of data is undoubtedly due in large measure to the cold fact that such interrogations usually are conducted incommunicado, although a contributing factor has also been the general absence of public concern with the problem.[164] Utilizing certain of its own decisions and such

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[163]*Id.* at 1640.

[164]In this regard, Mr. Justice Harlan emphasized in his dissent the ironic untimeliness of the *Miranda* code. "There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association . . . ; a distinguished study group of the American Law Institute . . . ;and the President's Commission on Law Enforcement and Administration of Justice . . . . Studies are also being conducted by the District

general surveys as the Wickersham Report of 1931, and the 1961 Report of the United States Commission on Civil Rights, the Court succeeds in depicting a custodial chamber of horrors in which illiterate suspects are beaten, hanged, whipped, kicked, deprived of food, subjected to intense cold, and burned with lighted cigarette butts in police efforts to obtain confessions.[165]

Although some may argue that the Court painted with too colorful a brush in depicting the physical brutality sometimes present in custodial interrogation, a candid appraisal of our criminal jurisprudence dictates the acknowledgement that too often the whip and the "water cure" have proved effective short-cuts to crime solution. In addition to the familiar whipping and hanging technique employed in *Brown*, two other methods of physical "questioning" are illustrated by reference to Mississippi cases. In *White v. State*,[166] a white store owner had been brutally hacked to death with an axe. The investigative procedure is best described by the Mississippi Supreme Court:

> The appellant, Gerrard White, a Negro boy eighteen years of age, employed as a farm hand, was arrested by the sheriff . . . and taken to the scene of the murder, where it appears he was released, but was again taken into custody by a Mr. Gilbert, a planter, who took him into the store where the dead man lay, and, after locking the door, proceeded to obtain a confession from him. The store was a small building, and there were gathered in the building several other white men, plantation owners and managers, some of whom were armed . . . . [T]he hands of the appellant were tied behind him, he was laid upon the floor on his back, and while some of the men stood upon his feet, Gilbert, a very heavy man, stood with one foot entirely upon the appellant's breast, and the other foot entirely upon his neck. While in that position what is described as the 'water cure' was administered to him in an effort to extort a confession as to where the money was hidden which was supposed to have been taken from the dead man. The 'water cure' . . . consisted of pouring water from a dipper into the nose of appellant, so as to strangle him, thus causing pain and horror, for the purpose of forcing a confession. Under these barbarous circumstances the appellant readily confessed that he knew where the money was, and told them that it was out at the 'dredge ditch.' They then took the appellant to the dredge ditch to find the money, but there was no money found there or anywhere else so far as this record shows.[167]

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of Columbia Crime Commission . . . and by others equipped to do practical research." Miranda v. Arizona, 86 Sup. Ct. 1602, 1653 (1966).

[165]Miranda v. Arizona, 86 Sup. Ct. 1602, 1613 (1966).

[166]129 Miss. 182, 91 So. 903 (1922).

[167]*Id.* at 187-88, 91 So. at 904.

The Mississippi Supreme Court had no hesitation in reversing White's conviction based on this "confession."

A second and unique form of "questioning" was described by the appellant in *Holmes v. State.*[168] During the course of the interrogation by a deputy sheriff, appellant testified that the following occurred:

> Q. Did he hit you in the mouth? A. Yes Sir.
> Q. What did they do? A. They said, 'That ain't the truth, you are going to tell it or we are going to put you on the horse' and I said, 'I ain't never seen it.' They cut an inner tube into pieces about that wide (indicating) and put that around my wrists and put the handcuffs on and run the rod through here (indicating) and handcuffed my feet when I got up off the floor, what I answered then I don't know. When I come to, they said, 'We got your confession.' Then they put me in the hole, a padded cell. I stayed there three or four days . . . .
>
> Q. Was that the only time they worked you over? A. That was the only rough stuff until a day or two later then they had that pipe. They said, 'Do you know what your statement is, whatever we put in it is true, we are going to put you back on the horse.' 'Boss,' I said, 'Whatever you said is true, I don't want to go back on that horse.'[169]

Finding that the record did not clearly reveal that the confession was free and voluntary, the Mississippi Supreme Court reversed Holmes' conviction.[170]

The consideration of numerous cases[171] similar to *White* and *Holmes* compelled the United States Supreme Court to the inevitable conclusion that the "use of physical brutality and violence is not, unfortunately,

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[168]211 Miss. 436, 51 So. 2d 755 (1951).

[169]*Id.* at 444, 51 So. 2d at 758.

[170]It is to the credit of the Mississippi court that, with the notable exception of *Brown,* it has jealously protected the right of a criminal defendant to have a coerced confession excluded. In reversing another conviction resting on a "water cure" confession, the court said: "We know there are time [*sic*] when atrocious crimes arouse people to a high sense of indignation. And this is true especially in cases where an upright citizen is murdered without cause. But the deep damnation of a defendant's crime ought not to cause those entrusted with the enforcement of the law to swerve from the calm and faithful performance of duty. Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions . . . . [A]nd wherever the court is clearly satisfied that such violations exist, it will . . . apply the corrective." Fisher v. State, 145 Miss. 116, 134, 110 So. 361, 365 (1926).

[171]See the cases collected in Miranda v. Arizona, 86 Sup. Ct. 1602, 1613 nn.6 & 7 (1966).

relegated to the past or to any part of the country."[172] Following this rather sanguine excursion into the violent aspects of custodial interrogation, the Court then examined the various psychological methods utilized to secure confessions. For resource material, the Court turned to what it called "police manuals and texts"[173] which, the majority said, "are used by law enforcement agencies themselves as guides"[174] and "present the most enlightened and effective means presently used to obtain statements through custodial interrogation."[175] From these sources the Court constructs an in-custody interrogation procedure which it assumes to be in universal use by police departments throughout the country.[176] This procedure utilizes various psychological ploys ranging from the "Mutt and Jeff" routine (in which one detective plays the role of a harsh, relentless inquisitor and the other detective is the friendly, solicitous confidante of the prisoner) to the "reverse line-up" technique (in which the prisoner is placed in a line-up, identified by several fictitious victims as the perpetrator of assorted crimes, and finally in desperation confesses to the principal offense in order to escape from the false accusations).[177] There are three essential psychological factors, said the Court, which create the setting for a successful interrogation. These factors are: privacy during the questioning; an assumption of the prisoner's guilt by the interrogator; and patience and perseverance on the part of the investigator.[178] The value of this interrogation setting is described by the Court as follows:

> To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed . . . . It is important to keep the subject off balance . . . by trading on his insecurity about himself or his

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[172] *Id.* at 1613.

[173] *Id.* at 1614, referring chiefly to INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) and O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1959).

[174] *Id.* at 1614.

[175] *Ibid.* In his dissent, Mr. Justice Clark challenges the authority of these "manuals and texts." He argues: "The materials it refers to as 'police manuals' are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection." Miranda v. Arizona, 86 Sup. Ct. 1602, 1641 (1966).

[176] *Id.* at 1615.

[177] *Id.* at 1616-17.

[178] *Id.* at 1615.

surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.[179]

A dramatic example of "trading on the prisoner's insecurity" in order to obtain a confession appears in the Mississippi case of *Johnson v. State*.[180] While in jail charged with murder, Johnson suffered a severe attack of malaria. His condition was described by a witness:

> [Johnson] was lying on his cot, and great beads of perspiration breaking out on his forehead and his hands and all portions of his cheek, and he was tossing from one side of the cot to the other, and turning over, and sat up awhile and laid down awhile, and his sentences were disconnected, and looked like he was mentally deranged.[181]

While in this condition, he was visited in the jail by a prominent Vicksburg newspaper man named Fitzgerald who considered it his duty as a citizen to "ferret out" the truth from Johnson. In the solitude of the jail cell, Fitzgerald questioned the obviously ill prisoner for more than an hour on three separate occasions. The psychological tactics employed are best described in Fitzgerald's testimony:

> I went up there that evening and said 'You better confess . . . there is no doubt about your guilt, and you have not slept a wink since you killed that boy, and you won't have any peace until you confess;' and I asked him what church he belonged to and that he had better look beyond the grave for comfort; that his only hope was salvation, . . . and he said, 'What are you anyhow?' and I said, 'I am a Spiritualist, and I can look down in your black heart and see this diabolical crime you committed at midnight the other night.'[182]

The probing gaze and funereal presence of the "Spiritualist" soon produced the desired confession and Johnson was later convicted of murder. In reversing, the Mississippi court held that the use of the "power of occultism" to exploit the superstitious fears of a prisoner in order to obtain a confession manifestly destroys the spontaneity and voluntariness of that confession.

The *Johnson* case, of course, demonstrates a unique interrogation method and does not necessarily support the *Miranda* assumption that a psychologically coercive interrogation procedure is in universal use by police departments throughout the country. However, there is clear

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[179] *Id.* at 1617.

[180] 107 Miss. 196, 65 So. 218 (1914).

[181] *Id.* at 206, 65 So. at 219.

[182] *Id.* at 205-06, 65 So. at 219.

corroboration of the validity of this assumption in the recent Mississippi case of *Robinson v. State*.[183] While under arrest for burglary, Robinson was placed in the typical interrogation setting described in the *Miranda* opinion: He was carried into an interrogation room where he was questioned by four officers; he was not warned or advised concerning his right to remain silent or his right to consult with counsel; and the questioning was pointedly aimed at the prisoner's insecurity in this environment. The procedure was described by one of the interrogating officers:

> I can't say that I said that, exactly, *but if I followed my regular routine,* I said it—'You are not telling us the whole story about the thing, now; the other members in your so-called gang have confessed to the whole story, why don't you tell the truth? . . . [T]he thing to do is to square yourself, not only with us but with the Man Upstairs, and if you don't do that, you are not trying to help yourself.'[184]

The interrogation setting in *Robinson* had the obvious effect of magnifying the fears and insecurity of the accused. This effect, coupled with the officers' blandishments that the prisoner should try to "help himself" by telling the truth, created an environment in which Robinson, though never physically touched, was literally "compelled" to incriminate himself by confessing. Recognizing these coercive influences, the Mississippi court held the confession incompetent and reversed Robinson's conviction.

It is important to note, however, that the records in none of the four cases embraced by the *Miranda* decision evidenced either "overt physical coercion or patented psychological ploys."[185] In fact, the Court conceded that in those cases it probably would not have found the confessions to have been involuntary in traditional due process terms.[186] Nevertheless, said the Court:

> In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures . . . . It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—

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[183]247 Miss. 609, 157 So. 2d 49 (1963).

[184]*Id.* at 612, 157 So. 2d at 50. (Emphasis added.)

[185]Miranda v. Arizona, 86 Sup. Ct. 1602, 1619 (1966).

[186]*Id.* at 1618.

that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[187]

D. The Code

Having concluded that (a) the fifth amendment privilege against self-incrimination is available outside the criminal court room and operates to protect an individual against compulsory incrimination during in-custody interrogation,[188] and (b) the interrogation procedures "universally" used by American law enforcement agencies are inherently compulsory, the Court then proceeds to the principal task of formulating a code of procedure which would provide the "protective devices" necessary to safeguard an arrestee's rights while in custody. The essential elements of the new code are spelled out in the opening paragraphs of *Miranda*.[189] As though fearful that the startled reader will not comprehend the import of what he is reading, the majority then repeats its formulation four additional times before concluding the opinion.[190] A construction of the code embodying the elements required by the Court in its five formulations is as follows:

> Section 1. *Definitions.* In this act:
> (a) "Custody" means the deprivation, by lawful authority, of the freedom of action of a person in any significant way.[191]
> (b) "Interrogation" means questioning initiated by law enforcement officers.[192]
> (c) "Waiver" means an intentional relinquishment or abandonment of a known right or privilege.[193]
> (d) "Warning" means to inform, in clear and unequivocal terms, of rights or privileges.[194]
> Section 2. *The Right to Remain Silent.* If law enforcement officers wish to interrogate a person in custody, they must first warn him that he has the right to remain silent and to refuse to answer any question.[195]

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[187]*Id.* at 1618-19.

[188]*Id.* at 1619-24. Here the Court carefully traces the development of the fifth amendment privilege.

[189]*Id.* at 1612.

[190]*Id.* at 1624, 1626, 1627, 1630.

[191]*Id.* at 1612.

[192]*Ibid.*

[193]*Id.* at 1628; Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The *Zerbst* definition of "waiver" was re-asserted in *Miranda* and applied to in-custody interrogation.

[194]Miranda v. Arizona, 86 Sup. Ct. 1602, 1624 (1966).

[195]*Ibid.*

Section 3. *Use of Statement.* The warning of the right to remain silent must be accompanied by a warning that anything said by the prisoner during such interrogation can and will be used against him in court.[196]

Section 4. *Right to Presence of Counsel.* Prior to any interrogation of a person in custody, he must be warned of his right to consult an attorney and to have counsel present during any interrogation.[197]

Section 5. *Right to Appointed Counsel.* The warning of the right to counsel shall be accompanied by an explanation that, if the person in custody cannot afford to employ an attorney, one will be appointed for him prior to any further interrogation.[198]

Section 6. *No Presumption of Waiver.* If an interrogation is conducted without the presence of an attorney and a statement is obtained from the accused, the prosecution shall have the burden of proving that such accused waived his privilege against self-incrimination and his right to retained or appointed counsel. A valid waiver will not be presumed merely from the silence of the accused after the required warnings are given or simply from the fact that a confession is in fact ultimately obtained.[199]

Section 7. *Effective Date.* This act shall take effect and be in force from and after June 13, 1966.[200]

E. Accommodation to the Code

To suggest that the *Miranda* code will have a marked effect on state police interrogation practices is to be guilty of a blatant understatement. The more apt suggestion is that its impact on such practices will be revolutionary. As with all revolutions, the process of adapting to the new regime will be painful and costly—costly in the sense that, unless adequate educational techniques are employed, we run the apparent risk of seriously damaging police morale and, ultimately, the quality of law enforcement. The "adequate educational techniques" must be grounded on an assumption that the new code is "the law of the land," that it applies to every law enforcement agency from the county constable to the highway patrol, and that to engage in vain

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[196]*Id.* at 1625.

[197]*Id.* at 1625-26.

[198]*Id.* at 1627.

[199]*Id.* at 1628.

[200]Johnson v. New Jersey, 86 Sup. Ct. 1772 (1966). On June 20, 1966, the Court decided the question of whether *Miranda* would be applied retroactively. After expressing concern that the retroactive application of the new code would require the "release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards," the Court held that *Miranda* applies only to cases in which the trial began after June 13, 1966. *Id.* at 1780.

polemics about the wisdom or constitutionality of its mode of enactment is merely to delay the process of adaptation and thereby to hamper, in a very real sense, the effective enforcement of the criminal law by state agencies.

Grounded on this basic assumption, these "adequate educational techniques" should desirably pursue two objectives: (1) The development, by serious research and experimentation, of prophylactic custodial interrogation procedures which are best suited for our own law enforcement practices and judicial customs; and (2) the development and production of a comprehensive and institutionalized training program for police officers and candidates.

The pursuit of the first objective has not been foreclosed by the *Miranda* decision. The Supreme Court clearly left the door open for the states to develop their own safeguards for the fifth amendment privilege, subject to the caveat that such procedures must be as effective as those enunciated in *Miranda*.[201] The development of these procedures would be a joint product of legislative enactment, rule of court innovations, and the adoption of codes of regulations for the internal government of police agencies. The greatest immediate benefit can obviously be achieved through the development and adoption of internal regulations to circumscribe and direct the activities of the police during custodial interrogation. It is to this end that the following proposals are directed.

1. *Warning as to Rights*

Despite the indication in recent cases[202] that some Mississippi officers have been giving *Miranda*-type warnings, this jurisdiction has in fact long followed the general rule[203] that a confession, otherwise valid, will not be rendered inadmissible because of a failure to warn the accused of his rights prior to interrogation.[204] As recently as 1963, our court considered the issue and held that there was no "merit in the fact that the officer did not advise or warn appellant that any statement he might make could be used against him in the trial of the

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[201]Miranda v. Arizona, 86 Sup. Ct. 1602, 1636 (1966). After encouraging state development of effective procedures, the Court then reiterated that the problems of in-custody interrogation "are of constitutional dimension and must be determined by the courts." *Id.* at 1636.

[202]See Thompson v. State, 186 So. 2d 747 (Miss. 1966); Gordon v. State, 160 So. 2d 73 (Miss. 1964).

[203]See, *e.g.*, 23 C.J.S. *Criminal Law* § 822 (1961).

[204]See, *e.g.*, Lewis v. State, 222 Miss. 140, 75 So. 2d 448 (1954); Tanner v. State, 216 Miss. 150, 61 So. 2d 781 (1953); Newell v. State, 209 Miss. 653, 48 So. 2d 332 (1950); Clark v. State, 209 Miss. 586, 48 So. 2d 127 (1950); Criss v. State, 202 Miss. 184, 30 So. 2d 613 (1947); Brown v. State, 142 Miss. 335, 107 So. 373 (1926).

case."[205] However, in jurisdictions which adhere to the general rule, evidence of a lack of pre-interrogation warnings is an element which is considered in determining the voluntariness of any subsequent confession.[206] Considering our court's adoption of the majority rule, it seems reasonable to assume that few articulated pre-interrogation warnings have been given arrestees by Mississippi officers prior to this time. Thus the *Miranda* requirements that specific, verbalized information be given a suspect concerning his right to remain silent, the use of his statement against him, his right to the presence of counsel, and his right to appointed counsel necessitate a major overhaul of this aspect of our police practices. The following ground rules should prove helpful in adjusting to the new requirements.

Rule No. 1. Prior to any questioning of a suspect in custody,[207] the police must specifically warn him of his several rights. The time of giving these warnings is of critical importance, for the Court repeatedly emphasized that they must be given "prior to any questioning,"[208] and "at the outset."[209] In both *Miranda* and *Westover*, there was direct testimony by the interrogating officers that the suspects had been given the necessary warnings during the course of the questioning.[210] However, Miranda had already orally made certain incriminating statements prior to the warning[211] and Westover had been questioned at length during a fourteen hour period before being warned of his rights.[212]

Rule No. 2. The required warnings must be articulated by the officer in a manner that effectively communicates to the suspect the specific content of the several constitutional rights involved. There is an insufficient communication of the warning if it is merely incorporated in a paragraph printed at the top of a form on which the accused's confession is subsequently recorded. In both *Miranda* and *Westover* the

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[205]Robinson v. State, 247 Miss. 609, 613, 157 So. 2d 49, 51 (1963).

[206]See, *e.g.*, Myrick v. State, 177 So. 2d 845 (Fla. 1965).

[207]The *Miranda* opinion specifically limits its effect to custodial interrogation and emphasizes that the questioning of individuals not in custody is not affected by the new code. "Our decision is not intended to hamper the traditional function of police officers in investigating crime . . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding . . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." Miranda v. Arizona, 86 Sup. Ct. 1602, 1629-30 (1966).

[208]*Id.* at 1630.

[209]*Id.* at 1624.

[210]*Id.* at 1637 nn.66 & 67, 1639.

[211]*Id.* at 1637 n.67.

[212]*Id.* at 1639.

confessions were written on such printed forms, but since the respective records did not affirmatively reveal that the warnings had been read to the suspects prior to questioning, the Court considered the printed warnings meaningless.[213]

Rule No. 3. The pre-interrogation warning must include each of the elements specified in the *Miranda* code, viz., the right to remain silent, the right to the presence of counsel, the right to appointed counsel, and the fact that any statement may be used against the suspect in court. Because of the obvious danger that the interrogating officer may inadvertently omit one of the critical elements in his articulation of the warnings to the suspect, it is suggested that law enforcement agencies adopt and ultilize a printed form similar to that reproduced in Appendix II to this article. These forms should be available in interrogation rooms and patrol cars, and should be carried on the person of each officer who may have occasion to place an individual in custody and thereafter subject him to questioning. In practice, the officer, prior to any interrogation, would fill in on the form the place, date, and time of the questioning, and then would clearly read to the suspect the warning as to his rights. If the suspect declines to make any statement, no further questioning may take place.[214] If he wishes to consult an attorney and is able to hire one, then he must be allowed to contact an attorney of his choice and to consult with such attorney before any further interrogation can occur.[215] If the suspect wishes to confer with an attorney but is unable financially to hire one, then there may be no further inter-

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[213]*Id.* at 1637-38.

[214]*Id.* at 1627. Assuming that the suspect chooses to remain silent in the face of accusations, the fact of this silence may not be used against him at the trial. *Id.* at 1624-25 n.37. This prohibition seemingly sounds the death knell for the venerable "silent admission exception" to the hearsay rule, at least insofar as custodial admissions are concerned. As defined by the Mississippi court, the rule expressing this exception is "that where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or deny is relevant as tending to show his guilt, and the accusatory or incriminating statement is admissible, not as evidence of the truth of the facts stated, but to show accused's admission by silence." Character v. State, 212 Miss. 30, 33, 53 So. 2d 41, 42 (1951). For cases involving such admissions while in custody see Robinson v. State, 235 Miss. 100, 108 So. 2d 583 (1959) (accusation made to prisoner in custody inadmissible because accuser was only 2½ years old and it was uncertain that the accusation referred to prisoner); Page v. State, 208 Miss. 347, 44 So. 2d 459 (1950) (accusations made prior to arrest and at time of arrest, and the resulting silence of the accused, were admissible); Anderson v. State, 171 Miss. 41, 156 So. 645 (1934) (accusation made in the presence of the arresting officer inadmissible because the record failed to disclose the reaction of the accused thereto). It is clear from *Miranda* that evidence relating to the accused's silence in the face of custodial accusations is no longer admissible.

[215]Miranda v. Arizona, 86 Sup. Ct. 1602, 1628 (1966).

rogation until a lawyer has been appointed and the suspect has had an opportunity to secure his advice and counsel.[216] Only if the suspect articulates an understanding of his rights, a willingness to answer questions, and the fact that he does not desire a lawyer may he then be asked any question the answer to which may tend to incriminate him. It is suggested that the waiver at the bottom of the printed form in Appendix II will satisfy the *Miranda* standards. Assuming a clear expression of understanding and willingness on the part of the suspect, the officer should then read the waiver statement to the suspect, allow him to read it and sign it, and then have the waiver witnessed and dated.

A healthy respect for the *Miranda* requirements and a faithful observance of the foregoing ground rules should enable our law enforcement agencies to operate effectively without the demoralizing fear that a careless word or act may later vitiate an important criminal conviction.[217]

2. *Making the Record*

Assuming that, despite the inhibitory effect of the *Miranda* warnings, the suspect nevertheless participates in a dialogue with the police and makes a statement of an incriminating nature, the second vital part of the process is reached—that of effectively and adequately laying the foundation for the admission of such statement in the trial. Traditionally, this foundation has included proof that the confession was freely and voluntarily[218] made and was not the product of force,[219] the threat of force,[220] fear,[221] or of promises or inducements.[222] *Miranda* now requires that this foundation also include clear proof that the necessary warnings were given, that the prisoner understood these warnings and his rights, and that he intelligently and knowingly waived these rights prior to making the statement. The burden of proving this foundation is

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[216]*Ibid.* The problem of providing counsel for indigents at the pre-interrogation stage of the criminal process is enormous in scope. This problem, and recommended solutions, will be examined in a later Part of this article.

[217]It remains to be seen, however, what effect the new code will have on the number of confessions obtained by the police.

[218]Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925).

[219]See, *e.g.*, White v. State, 129 Miss. 182, 91 So. 903 (1922) ("water cure" administered to suspect).

[220]See, *e.g.*, Holmes v. State, 211 Miss. 436, 51 So. 2d 755 (1951) (threat to put suspect back on the "horse" unless he confessed).

[221]See, *e.g.*, Bourdeaux v. State, 175 Miss. 625, 168 So. 621 (1936) (confession induced by fear of mob violence).

[222]See, *e.g.*, McDowell v. State, 189 Miss. 617, 198 So. 564 (1940) (suspect confessed after being promised by officers that they would "make his sentence as light as they could").

of course upon the state,[223] and it is essential that each element of the foundation proof be testified to directly. The Supreme Court has clearly held that no presumption of a waiver may be inferred from a silent trial record. In *Carnley v. Cochran*,[224] it said:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.[225]

A similar standard was posited by our court in *Conn v. State*:[226]

> [W]e hold that there must be an intelligent and competent waiver of counsel by the defendant and that the trial court should so determine, and, further, that such determination, as well as the facts on which it is based, should appear in the record.[227]

In order adequately to lay the foundation for the admission of a confession, therefore, it is apparent that the officers who conducted the interrogation must testify directly and without equivocation[228] that the required warnings were given prior to the questioning, that the suspect appeared to understand the warnings and the rights which they concerned, and that he indicated a willingness to make a statement without first consulting a lawyer.[229] It is submitted that the use of a printed warning and waiver form similar to that contained in Appendix II will greatly facilitate the testimonial qualification of the proffered

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[223]Lee v. State, 236 Miss. 716, 112 So. 2d 254 (1959). The procedure to be followed in proving a confession is detailed in Agee v. State, 185 So. 2d 671 (Miss. 1966).

[224]369 U.S. 506 (1962).

[225]*Id.* at 516.

[226]251 Miss. 488, 170 So. 2d 20 (1964).

[227]*Id.* at 495, 170 So. 2d at 23. For a similar expression of the standard see Hogue v. State, 253 Miss. 667, 178 So. 2d 677 (1965); Plummer v. State, 252 Miss. 45, 172 So. 2d 547 (1965); Clarke v. State, 251 Miss. 627, 170 So. 2d 575 (1965).

[228]*Cf.* Haynes v. Washington, 373 U.S. 503 (1963), wherein a conviction based on Haynes' confession was reversed because the officer equivocated in his testimony concerning the facts of the interrogation. Haynes testified directly that he confessed after the police told him that he could not call his wife until he "cooperated" with them. The detective did not deny this but testified only that he could not "remember" whether Haynes had asked to call his wife and conceded that the petitioner "could have" made such a request.

[229]Miranda v. Arizona, 86 Sup. Ct. 1602, 1626 (1966). The Court emphasized that no waiver of a right to counsel during interrogation will be recognized unless specifically made *after* the required warnings were given.

confession. Assuming that the interrogating officers have in fact utilized this form in verbalizing the required warnings, and that the subject has indicated an understanding of his rights and has articulated his waiver of those rights, the foundation testimony need only follow the outline of the form in relating the contextual facts of the interrogation, the facts of the warnings, and the articulation of the waiver. At this point, assuming of course that the confession has been qualified as being voluntary in character, the state has seemingly fulfilled the *Miranda* waiver requirements[230] and the confession may be received in evidence.

The utilization of procedures similar to those outlined above is clearly permissible under *Miranda*,[231] and would constitute an initial step in the realization of our first objective of developing "prophylactic custodial procedures best suited for our own practices and customs."

The implementation of our second objective—the institution of a comprehensive training program for law enforcement officers—is a vital corollary to the first objective. In order to achieve continuity and a level of academic responsibility, this training program should be institutionalized in form.[232] The program content must be broad-ranging in its scope and must be designed to accomplish more than merely inform the officers of the limitations imposed by the new code and of permissible techniques of interrogation. To be truly effective, it must also be phrased in such a way as to instill respect for the interrogation process and for the individuals subjected to it. Additionally, it must furnish the officers a practical working knowledge of contemporary methods of crime investigation and of the scientific tools which are available to assist them in this process. A program of this nature will achieve its initial purpose of providing the basic mechanical skills of police work. But perhaps more importantly, it will build the confidence of the individual policeman not only in his own abilities but in the rightness and justice of his task.

The end result of a serious effort to fulfill our two objectives can only be a quality of law enforcement which insures the security of society and, in the same process, safeguards the essential constitutional rights of the individual accused of crime.

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[230]*Id.* at 1628. An illustration of an adequate pre-*Miranda* testimonial foundation is contained in Thompson v. State, 186 So. 2d 747 (Miss. 1966), wherein the interrogating officer testified clearly and directly to the giving of the necessary warnings, to the prisoner's understanding of such warnings, and to her waiver of the rights to remain silent and to the presence of counsel.

[231]Miranda v. Arizona, 86 Sup. Ct. 1602, 1624 (1966).

[232]Mississippi has already made important progress in implementing this second objective by the establishment of the State Law Enforcement Academy at Jackson and by the institution of a degree program in Police Administration and Law Enforcement at the University of Mississippi.

APPENDIX II

Your Rights

Place _____

Date _____

Time _____

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. If you are unable to hire a lawyer, one will be appointed for you, if you wish, by the Court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Waiver

I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed _____

Witness _____

Witness _____

Time _____

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STUDENT COMMENTS

THE AFTER-ACQUIRED TITLE DOCTRINE AND MINERAL CONVEYANCES

I. Introduction

While many conveyancers are familiar with the doctrine of after-acquired title, a subject around which there has arisen no little amount of legal literature,[1] there remain some tricky and involved facets of the doctrine which merit constant review by practicing attorneys and law students. Simply stated, the doctrine is that "if a conveyance purports to transfer a certain estate, whether this appears from recitals, covenants, or any other part of the instrument, the grantor is estopped thereafter to assert that, by reason of lack of title in him at the time, such an estate did not pass by the conveyance."[2] If *A* conveyed Blackacre to *B*, in other words, without actually having title thereto, *A* could not later claim that he had acquired a title to the land which was superior to *B*'s title. *A* would, in essence, be estopped from asserting that he acquired title *after* and not before the conveyance to *B*. The courts in this country have considered *A*'s after-acquired title as veritably being transferred or passing to *B* when *A* obtains it; this consideration is said to be based on the principle that equity considers that as done which it would compel to be done.[3]

The doctrine of after-acquired title stated above is not, of course, without limitation. Since the estoppel in favor of the grantee is based on the fact that the grantor's conveyance was of a certain estate, it is said that no estoppel can take place if the grantor purports to convey only such interest as he has to convey, *i.e.*, if his attempted transfer is not of a *certain* estate.[4] Likewise, if the grantor's deed recites that he intends to pass only a partial interest in the property in question, the estoppel in favor of the grantee is coextensive with that interest only, even when the grantor later acquires a greater interest.[5] Logically, neither is a grantor estopped from asserting an after-acquired title which he obtained from his grantee.[6] These three exceptions to the doctrine are so basic that it might be said that they constitute a part of its very definition.

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[1] See Ethridge, *The After-Acquired Property Doctrine and Its Application in Mississippi*, 17 Miss. L.J. 153 (1945), for an excellent discussion of the doctrine as applied in general conveyancing matters in Mississippi.

[2] 4 Tiffany, Real Property 639 (3d ed. 1939).

[3] *Id.* at 642.

[4] *Ibid.*

[5] *E.g.*, McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So. 2d 105 (1957).

[6] 4 Tiffany, Real Property 649 (3d ed. 1939).

Now that a very general statement of the after-acquired title doctrine has been presented, it remains to consider the application of the doctrine in the various types of conveyancing known to the field of oil and gas law. Such consideration is the purpose of this comment.

It is generally settled that the doctrine of after-acquired title applies to conveyances of interests of oil and gas.[7] The doctrine would seem to apply whether or not the mineral estate were severed from the surface estate.[8] It is therefore the aim of this comment to consider the application of the doctrine to warranty deeds of minerals, quitclaims, and leases, giving particular regard to Mississippi case law and statutes. Where necessary, a review of the general law of the after-acquired title doctrine will be presented; however, it is not within the primary scope of this comment to deal with the application of the doctrine to non-mineral conveyances.

II. Quitclaim Deeds

A. General Application

The majority of the courts have consistently held that the doctrine of estoppel by deed is not applicable to quitclaim deeds.[9] Such a holding is based upon the absence of any expressed or implied representation upon which to base the estoppel.[10] However, mere terminology alone is not generally regarded as requiring a conclusive result. A majority of the courts apply the doctrine to conveyances which employ the terminology of a quitclaim deed when the deed further recites that a definite estate is conveyed or when it implies that the grantor is possessed of a certain interest.[11] In many of these cases, the courts have looked to the *intention* of the parties in an effort to determine whether or not they intended to convey a particular interest.[12] Such results illustrate that covenants of warranty are not generally regarded as prerequisites to the passage of after-acquired title.[13] The following test appears accurately to state the majority viewpoint:

> In general, the test is whether the conveyance is limited to the grantor's interest as distinguished from an interest in the estate or land in question.[14]

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[7]See 1A Summers, Oil and Gas 241-45 (1954).

[8]Kuntz, Oil and Gas § 3.2 (1962).

[9]Greene, *Selected Problems in Mineral Conveyances: After-Acquired Title,* 10 Rocky Mt. Min. L. Inst. 369, 380 (1965). See generally Annot., 144 A.L.R. 554, 561 (1943).

[10]Greene, *supra* note 9, at 380.

[11]Van Rensselaer v. Kearney, 18 U.S. (11 How.) 631, 640 (1850). See generally Annot., 144 A.L.R. 554, 561 (1943).

[12]Annot., 144 A.L.R. 554, 561, 580-81 (1943).

[13]Comment, 11 Sw. L.J. 217, 219 (1957).

[14]Greene, *supra* note 9, at 380-81.

B. Mississippi Application

In regard to the application of the doctrine of after-acquired title to quitclaim deeds, Mississippi has two relevant statutes. They are as follows:

> § 845: A conveyance without any warranty shall operate to transfer the title and possession of the grantor as a quitclaim and release.[15]
>
> § 846: A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed.[16]

A reading of section 846 would indicate that Mississippi applies the estoppel doctrine to quitclaim deeds. And, in the case of *Myers v. American Oil Co.*,[17] the Mississippi Supreme Court did in fact hold that the doctrine extended to quitclaim deeds. But, in later cases, the supreme court has been explicit in holding that the statute would not be strictly construed. In *Perkins v. White*,[18] decided in 1950, the court refused to apply the doctrine to a quitclaim deed of property. The court found that the factual situation in that case only indirectly involved a quitclaim deed, and decided that application of the statute would be clearly improper under the circumstances. In another 1950 decision, *Crooker v. Hollingsworth*,[19] the court encountered an unusual set of facts and refused to apply the estoppel provisions of the statute. After stating that "it must be an unusual case on the facts which would authorize a circumvention of Section 846 . . . ,"[20] the court indicated that certain factual situations would require the courts to apply equitable principles rather than to render a strict construction to the statute.[21] And in *McLaurin v. Royalties, Inc.*,[22] a 1957 decision and the only case in the oil and gas area construing section 846, the court held that:

> [T]he estoppel created by the statute [§ 846] is coextensive only with the estate, right or interest which the conveyance purports to convey.[23]

In effect, the court indicated that the determinative test was the intention of the parties when it stated:

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[15]MISS. CODE ANN. § 845 (1956).
[16]MISS. CODE ANN. § 846 (1956).
[17]192 Miss. 180, 5 So. 2d 218 (1941).
[18]208 Miss. 157, 43 So. 2d 897 (1950).
[19]210 Miss. 636, 46 So. 2d 541 (1950).
[20]*Id.* at 644, 46 So. 2d at 545.
[21]*Ibid.*
[22]231 Miss. 240, 95 So. 2d 105 (1957).
[23]*Ibid.*

> [T]he instrument clearly manifests an *intention* on the part of the grantor to convey whatever interest was vested in the grantor at the time of the execution of the instrument.[24]

Thus, since the intention was to convey only the grantor's interest as distinguished from a certain interest in the property and since the instrument did not, either expressly or by implication, affirm the existence of any interest in the grantor, the court expressly held that the estoppel doctrine was not applicable.[25]

C. Summary of Quitclaim

It is submitted that there should be no rigid rule set in regard to the application of the estoppel doctrine to quitclaims, but that the intention of the parties, as ascertained from the entire document, should be followed. If it appears that the parties intended that a specific res or estate should pass, then the doctrine would apply; but if only the grantor's present interest was intended to be conveyed, then the doctrine would not apply. When a grantor intends to convey only his present interest, he and his attorney should use care to insure that there are no implications that the grantor owns any certain interest in the property.

If the Mississippi Supreme Court gave a strict interpretation to section 846 and applied the estoppel doctrine to all quitclaims, it would appear that the results reached would often be contrary to the intentions of the parties and would cause injustice to the grantors. Often, and perhaps the majority of the time, no actual estate is intended to pass when a quitclaim is given. It is submitted that the *McLaurin* case gives a practical construction to the statute since it allows the intentions of the parties to govern. Actually, a strict interpretation of section 846 would seem to operate advantageously only when fraud is involved—only when the grantee, for a valuable consideration and in good faith, thought and was led to believe that he was receiving an actual interest in the property.

III. Conveyances with Covenants

At common law, the subsequent acquisition of an interest which a grantor of a warranty deed for value had purported to convey, inured to the benefit of his prior grantee; the prior grantee thereby automatically obtained the grantor's after-acquired title by way of estoppel,[26] provided that the deed on which the estoppel was based was valid and

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[24] *Ibid.* (Emphasis added.)

[25] *Ibid.*

[26] Bigelow, Estoppel 429 (6th ed. rev. 1913).

duly delivered.[27] This result is also achieved under the Mississippi statute, which gives the word "warrant" the same effect as the five common law covenants:

> § 843: The word 'warrant' without restrictive words in a conveyance shall have the effect of embracing all of the five covenants known at common law, to wit: seizin, power to sell, freedom from encumbrance, quiet enjoyment and warranty of title.[28]

In his article "The After-Acquired Property Doctrine and Its Application in Mississippi,"[29] Chief Justice Ethridge pointed out that in many cases involving conveyances with warranty provisions, the doctrine has been held to apply under the Mississippi statute.[30]

The after-acquired title doctrine, which has its foundation in equitable estoppel,[31] apparently applies regardless of how the grantor subsequently obtains title.[32] The doctrine generally aids the original grantee and persons claiming under him; likewise, it applies against the grantor, his heirs and representatives, and any other parties with notice of the conveyance out of which the estoppel arises.[33] The importance of the doctrine in the promotion of security of titles under the Mississippi statute has long been recognized.[34]

The Mississippi Supreme Court has stated that a warranty in a deed "carries with it an after-acquired title later obtained by the grantor,"[35] and that title is passed to the grantee *eo instanti*.[36] In holding the doctrine applicable to a warranty conveyance of timber, the court stated that "when the warrantor acquires an outstanding paramount title, it cannot be used to defeat the title of the warrantee, but will inure to the benefit of the warrantee. This is a familiar principle of law and needs no citation of authorities."[37] The Mississippi court has also acknowledged that the doctrine can properly apply to mineral deeds.[38]

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[27]*Id.* at 380.

[28]MISS. CODE ANN. § 843 (1956).

[29]17 MISS. L.J. 153 (1945).

[30]See Garner v. Garner, 117 Miss. 694, 78 So. 623 (1918); Harrison v. Byers, 112 Miss. 651, 73 So. 614 (1917); Andrews v. Anderson, 16 So. 346 (Miss. 1894); Kaiser v. Earhart, 64 Miss. 492, 1 So. 634 (1886).

[31]Crooker v. Hollingsworth, 210 Miss. 636, 46 So. 2d 541 (1950).

[32]See, *e.g.*, Brown v. Brothers, 231 Miss. 729, 97 So. 2d 642 (1957) (from cotenant).

[33]1 PATTON, TITLES § 215 (2d ed. 1957).

[34]Bush v. Person, 59 U.S. (18 How.) 82 (1855).

[35]Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 67 So. 2d 714 (1953).

[36]Edwards v. Hillier, 70 Miss. 803, 13 So. 692 (1893).

[37]Mississippi Sawmill Co. v. Douglas, 107 Miss. 678, 689, 65 So. 885, 887 (1914).

[38]See Perkins v. White, 208 Miss. 157, 165-66, 43 So. 2d 897, 899 (1950).

At least a passing reference should be made here concerning the other statutory conveyances which involve covenants. Under the Mississippi statute concerning special warranty deeds,[39] the after-acquired title doctrine is made applicable to such deeds. As Chief Justice Ethridge has pointed out,[40] the doctrine is also made applicable to a deed reciting the statutory words "grant, bargain and sell."[41]

The foregoing review of authority indicates the application of the after-acquired property doctrine to mineral and surface conveyances which contain covenants; it is now appropriate to turn to a consideration of the complicated field of mineral deeds which includes exceptions and reservations.

IV. Conveyances with Reservation or Exception

Historically there was a distinction made between the terms "exception" and "reservation" in conveyances.[42] While an exception was said to save or exclude something from the grant, a reservation carved out a new interest in favor of the grantor. By reserving an interest, in other words, the grantor was considered to have done more than merely protect himself on his covenants of warranty.[43] The Mississippi Supreme Court has stated that the words "exception" and "reservation" are often used interchangeably and that the court, in determining whether an exception or a reservation is present in a conveyance, will look to the intention of the parties and the type of interest which they sought to create rather than at their mere use of terms.[44]

The application of the after-acquired title doctrine to conveyances with reservations or exceptions may be illustrated by the following examples:

> *Example:* A conveys Blackacre to *B* by a general warranty deed and excepts one-half of the minerals. *A* owns only an undivided one-half of the minerals at the time of the conveyance, and the exception is from his warranty; however, the grant describes the land so that *all* of the minerals are purported to be conveyed. Subsequently, *A* acquires the interest which he excepted. Is *A* then estopped to assert this title against *B* under the after-acquired title doctrine?[45]

There are no Mississippi cases in point to answer the question, but in

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[39]Miss. Code Ann. § 844 (1956).

[40]Ethridge, *The After-Acquired Property Doctrine and Its Application in Mississippi*, 17 Miss. L.J. 153, 156 (1945).

[41]Miss. Code Ann. § 847 (1956).

[42]1 Williams & Myers, Oil and Gas Law § 310 (1964).

[43]*Ibid.*

[44]See, *e.g.*, Cook v. Farley, 195 Miss. 638, 652, 15 So. 2d 352, 356 (1943).

[45]See 1 Williams & Meyers, Oil and Gas Law § 310.2 (1964).

Texas at least one case has in effect stated the answer in the affirmative.[46] While the application of the doctrine in such a case has been criticized as being inconsistent with the intention of the parties,[47] the basis for the grantor's estoppel is said to be that he has, by the terms of his conveyance, purported to convey a certain estate or interest.[48]

The following example indicates the modified application of the doctrine to a deed with a reservation:

> *Example:* *A* owns the surface and an undivided one-half of the minerals in Blackacre; he conveys Blackacre to *B* by a general warranty deed which describes the entire surface estate, but *A* reserves an undivided one-half interest in the minerals.

These are substantially the facts of the famous case of *Duhig v. Peavy-Moore Lumber Co.*,[49] in which the Supreme Court of Texas applied a modified version of the after-acquired title doctrine. The question in the case was whether *A*, by reserving half of the minerals, kept that half which he owned at the time of the conveyance or conveyed it to *B* along with the surface estate. The Texas court held that *B* obtained *A*'s one-half mineral interest by the conveyance and that *A*'s reservation was not effective. The court arrived at this conclusion by two lines of reasoning; the first set of reasons did not involve the after-acquired property doctrine, but the second set applied the doctrine's principle of estoppel. Under the first reasoning process, the court looked at the deed as a whole and found that it expressed the intention of the parties that *B* should receive the surface and one-half of the mineral estate. From this premise the conclusion was reached that the reservation merely withheld from the conveyance the one-half mineral interest which the grantor did not own.[50]

The second rationale of the *Duhig* decision was that (1) *A*'s deed to *B* was a warranty conveyance of the surface estate and one-half of the minerals; (2) *A*'s reservation of one-half of the minerals expressed *A*'s intention to keep the minerals which he owned; (3) by his reservation, *A* breached his warranty; and (4) by a modification of the after-acquired property doctrine, *A* should be estopped to assert title by way of his reservation. As the court in *Duhig* pointed out, although the after-acquired property doctrine could not come precisely into play in the case, an analogous principle of estoppel was applicable:

> In the instant case Duhig [*A*] did not acquire title to the one-half interest in the minerals after he executed the deed contain-

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[46]Shield v. Donald, 253 S.W.2d 710 (Tex. Civ. App. 1952).

[47]See 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 310.2 (1964).

[48]KUNTZ, OIL AND GAS § 14.3 (1962).

[49]135 Tex. 503, 144 S.W.2d 878 (1940).

[50]*Ibid.*

> ing the general warranty, but he retained or reserved it in that deed.[51]

The court did not require *B* to sue *A* for breach of warranty, stating that the doctrine of after-acquired property extends to prohibit

> the *assertion* of title in contradiction or breach of the warranty. If such enforcement of the warranty is a fair and effectual remedy in case of after-acquired title, it is, we believe, equally fair and effectual and also appropriate here.[52]

The Mississippi Supreme Court has achieved the *Duhig* result in several cases,[53] but it has consistently applied the first *Duhig* rationale and resolved questions concerning an attempted reservation by the grantor by relying on the importance of the grantor's warranty obligation as opposed to his right of reservation.[54]

It is submitted that the *Duhig* result is correct, whether the after-acquired title analogy is drawn or not. The solution to construction problems in conveyances with reservations or exceptions should depend on the intention of the parties as expressed by the instrument, and specifically it should depend to a greater degree on what was intended to be conveyed to the grantee than on what the grantor intended to keep.[55] The draftsman, of course, should prevent such questions of construction from arising by specifically indicating whether the grantor is retaining a new interest which he carves out by the deed or merely saving back an interest to protect himself on his warranty.

V. Applicability of After-Acquired Title Doctrine To Leases

In the area of oil and gas leases, the doctrine of after-acquired title presents special problems that do not arise in its applicability to deeds. Some of these special problem areas are discussed below.

A. General Application

The doctrine of estoppel by deed in regard to after-acquired title is generally held to be applicable to mineral leases, so that the lessor will be precluded from asserting a subsequently acquired adverse interest against the lessee;[56] or at least, an "equivalent doctrine" is applicable

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[51] *Ibid.*

[52] *Ibid.*

[53] Brannon v. Varnado, 234 Miss. 466, 106 So. 2d 386 (1958); Garraway v. Bryant, 224 Miss. 459, 80 So. 2d 59 (1955); Salmen Brick & Lumber Co. v. Williams, 210 Miss. 560, 50 So. 2d 130 (1951).

[54] *E.g.*, Lucas v. Thompson, 240 Miss. 767, 128 So. 2d 874 (1961).

[55] 1 Williams & Meyers, Oil and Gas Law § 311 (1964).

[56] Butler v. Bazemore, 303 F.2d 188 (5th Cir. 1962). See generally Comment, 11 Sw. L.J. 217, 227 (1957).

to lease situations.[57] In the few cases which have held the estoppel doctrine inapplicable to oil and gas leases, the reasoning of the courts has been that the lease was "more in the nature of a sale of mineral rights by the lessor, rather than a lease of premises,"[58] thus requiring a suit for damages rather than applicability of the estoppel doctrine.

Historically, at common law, the English courts applied the estoppel doctrine to leases by indenture of land when the lessor had owned no interest in the land at the time of executing the lease.[59] However, these courts did not always apply the doctrine if the lessor owned some interest at the time of execution of the lease.[60]

Today, the courts restrict the estoppel to the exact type of mineral interest purported to be conveyed in the lease.[61] Thus, if a lessor purports to convey a mineral interest and if he subsequently acquires a royalty interest, he will not be estopped to claim the royalty interest.[62] Also, the case of *Garrett v. Lion Oil & Refining Co.*[63] points out that when the lessor expressly excepts a certain interest from the lease, after-acquired title to the excepted interest will not inure to the benefit of the lessee.

Thus, it appears that the courts will generally apply the estoppel doctrine to leases. Such a result seems desirable; since after-acquired title is passed through the warranty clause of a deed and since both the deed and lease pass title to minerals in place, there should be no reason why after-acquired title should not also pass through the warranty clause of a lease.[64]

B. Basis for Application: Warranty of Implied Covenants

The application of the estoppel doctrine to leases may be justified either upon the basis of express or implied covenants of warranty.[65] Most modern leases contain express covenants of warranty,[66] and in such situations, the doctrine is governed by the same principles that are applicable to deeds.[67]

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[57]Annot., 51 A.L.R.2d 1238 (1957).

[58]Annot., 87 A.L.R.2d 602, 606 (1963).

[59]4 TIFFANY, REAL PROPERTY 638 (1940). See generally Annot., 51 A.L.R.2d 1238 (1957).

[60]4 TIFFANY, REAL PROPERTY 638 (1940).

[61]See, *e.g.*, McKinnon v. Lane, 285 S.W.2d 269, (Tex. Civ. App. 1955).

[62]McDonald v. Sanders, 207 S.W.2d 155 (Tex. Civ. App. 1947).

[63]173 Ark. 429, 292 S.W. 405 (1927).

[64]Jackson, *Consequences of Title Failure in Oil and Gas Transactions*, 9 INST. ON OIL AND GAS LAW AND TAXATION 285, 294 (1958).

[65]Greene, *Selected Problems in Mineral Conveyances: After-Acquired Title*, 10 ROCKY MT. MIN. L. INST. 369, 388 (1965).

[66]Jackson, *supra* note 64, at 287.

[67]Greene, *supra* note 65, at 388.

Even where there is no express covenant of warranty, the courts generally apply the doctrine to leases, on the basis that leases carry with them implied obligations.[68] Thus, it has been stated that:

> [E]ven where the lease contained no express covenant for quiet enjoyment, it seems that such a covenant generally would be implied . . . [and] the more general indication of the cases is that an estoppel by lease may arise even though there is only an implied covenant of title or quiet enjoyment.[69]

However, since most leases contain express covenants of warranty, questions as to the implication of covenants of title will arise infrequently.[70]

C. Proportionate Reduction Clauses

Since most modern lease forms contain a proportionate reduction clause, a discussion of its impact upon the warranty clause and upon the estoppel doctrine is relevant. Such a clause provides for a reduction of payments to the lessor when his actual interest is less than he purported to lease. Although there are many variations of proportionate reduction clauses, the following one is a typical example:

> If said lessor owns a less estate in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in proportion which his interest bears to the whole and undivided fee.[71]

Often, the same lease will contain both a proportionate reduction clause and a warranty clause. To obtain the proper construction of the lease, the two clauses must be read together. The purpose of the proportionate reduction clause is not to nullify the warranty clause[72] nor to reduce the interest which the lessor purports to convey;[73] rather its purpose is "to express the real intention of the parties concerning treatment of bonus, royalties and delay rentals where lessor's title fails."[74] Neither clause is to impair the validity of the other.[75] Thus, it has been

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[68]See, *e.g.*, Texas Pac. Coal & Oil Co. v. Fox, 228 S.W. 1021 (Tex. Civ. App. 1921).

[69]Annot., 51 A.L.R.2d 1238, 1245 (1957).

[70]4 Williams, Oil and Gas Law § 685.1 (1964).

[71]Williams & Meyers, Oil and Gas Law, Manual of Terms 311 (1964).

[72]Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077 (1935).

[73]See Nixon v. Cowan, 134 Tex. 262, 135 S.W.2d 96 (1940).

[74]Smith, *The Proportionate Reduction Clause in Oil and Gas Leases—Relationship to After Acquired Title and Warranties*, 5 Rocky Mt. Min. L. Inst. 341, 342 (1960).

[75]See 4 Williams, Oil and Gas Law § 686.9 (1964).

held that the proportionate reduction clause does not prevent the passage of after-acquired title,[76] nor does it nullify the warranty clause by reducing the estate which the lessor purports to convey.[77] The proportionate reduction clause is for the benefit of the lessee,[78] and it shows the intention of the parties that the lessee will pay only a 1/8 royalty for the full mineral interest.[79]

The important place assumed by the proportionate reduction clause in the construction of oil and gas leases is illustrated by the fact that it now appears to be validly contended that such clauses should be implied in every lease when not expressly provided for.[80] Professor Williams and Professor Meyers state: "And where it is not provided for, we think such an intention may be inferred from the custom of the industry."[81] The clause, whether express or implied, seems essential to the oil and gas lease since it allows the real intention of the parties to control when there is a failure of the lessor's title; surely the parties do not intend for the lessee to pay 100 per cent of the agreed royalty, bonus, etc., if the lessor does not own 100 per cent of the estate which he has purported to convey. It has been pointed out that:

> The clause came to be used . . . at a time when case authority on the matter was limited and it was employed in order to make it crystal clear that in the event of a title failure, certain of the lessor's benefits under the lease were to be reduced.[82]

Regardless of whether the clause is included, a failure of either the mineral or royalty title should produce the same result: a reduction of the royalty payments.[83]

D. Applicability to Failure of Royalty Title in Oil and Gas Lease

> *Example:* *A* owns the entire mineral interest in Blackacre except for a 1/16 non-participating royalty held by *Y*. *A* executes a lease to *B* reserving a 1/8 royalty. The lease contains a proportionate reduction clause.

In this example, the doctrine of estoppel, as illustrated by the *Duhig* rule, should be applied; however, the *Duhig* rule must be modified so as to fulfill the intention of the parties.[84] Since the lessee usually intends

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[76]Robben v. Obering, 279 F.2d 381 (7th Cir. 1960).

[77]See Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077 (1935).

[78]*Ibid.*

[79]1 Williams & Meyers, Oil and Gas Law § 316.3 (1964).

[80]See 4 Williams, Oil and Gas Law § 686.3 (1964).

[81]1 Williams & Meyers, Oil and Gas Law § 316.5 (1964).

[82]4 Williams, Oil and Gas Law § 686.3 (1964).

[83]*Ibid.*

[84]1 Williams & Meyers, Oil and Gas Law § 316.3 (1964).

to pay only 1/8 royalty on 100 per cent of the minerals, the *Duhig* rule should be followed in its modified application—by subtraction—to give effect to the intention of the parties.[85]

In the example given, it might be contended that there are conflicting expressions of intention. In the lessor's favor, the lease expressly recites that he is to receive a 1/8 royalty. In the lessee's favor, the custom of the industry is for a payment of only a 1/8 royalty,[86] and such should be held to be the intention of the parties in the absence of other expressive language in the lease; secondly, the proportionate reduction clause, when read in conjunction with the granting clause, indicates that the lessee is to pay only a 1/8 royalty in the aggregate.[87] The granting clause conveys all but a 1/8 royalty and the proportionate reduction clause provides that if the lessor owns less than he purported to convey, royalty and rentals are to be proportionately reduced; thus, the two clauses read together clearly indicate that the lessee is only to pay a 1/8 royalty on 100 per cent of the minerals. But even though there may be conflicting expressions of intention, application of the *Duhig* rule would require the expressions of intention favoring the lessor to yield to the expressions of intention favoring the lessee.[88] And moreover, the proportionate reduction clause and the custom of the industry should represent superior expressions of intention to the mere provision for a 1/8 royalty to be paid to the lessor, especially when the lease contains no mention of an outstanding interest.

Subtraction is the proper method for determining the lessor's royalty interest when there has been a partial failure of royalty title. Since the lessor does own the entire mineral interest, it would be impossible to apply the proportionate reduction clause so as to reduce royalty pro rata. However, the proportionate reduction clause does indicate that only a 1/8 royalty in the aggregate is to be paid. Thus, subtraction of the outstanding royalty interest will fulfill the intention of the parties.[89] The result reached will be equitable and proper: the lessee will pay only a 1/8 royalty, the lessor will be paid the usual 1/8 royalty minus only the part of the 1/8 royalty to which he does not have title.

E. Applicability to Failure of Mineral Title in Oil and Gas Lease

Example: *A* is the owner of an undivided 50% of the mineral interest in Blackacre. *A* leases to *B*, reserving a 1/8 royalty. The lease contains a proportionate reduction clause.

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[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*

In the example given, the *Duhig* rule of after-acquired title should not be applied.[90] If it were applied, *A* would be estopped to claim the 1/8 royalty; thus, he would obtain no royalty at all for his lease of 50 per cent of the minerals.[91] Clearly, such a result would be contrary to the intention of the parties and would be manifestly unjust to *A*. The lease expresses an intention that *A* is to receive a 1/8 royalty on the interest that he owns; therefore, the reserved royalty should be reduced *pro rata*.[92] The reduction should be by the pro rata method because the proportionate reduction clause requires this result, and, as stated above, if a proportionate reduction clause is not expressly present, it should be present by implication so that the intention of the parties may be fulfilled.[93] In regard to mineral title failure, Williams and Meyers aptly state:

> Whatever title lessor undertakes to convey, the proportionate reduction clause of the lease discloses an intention that the reserved royalty will be paid on that title which actually passes. In short, proportionate reduction is properly applied because it is expressly provided for. And where it is not provided for, we think such an intention may be inferred from the custom of the industry.[94]

The first case expressly to hold that *Duhig* did not apply to the reserved royalty in leases upon failure of mineral title was *McMahon v. Christmann*.[95] After pointing out that application of the *Duhig* rule would allow the lessee to take all of the lessor's interest without paying any royalty, the majority of the court stated that such a result would be "unthinkable and contrary to all modern human experience in the oil and gas industry . . . [and would] all too often frustrate rather than effectuate the intention of the parties."[96]

In summary, if the lessor subsequently obtains an outstanding mineral interest, then such interest should inure to the lessee. But when there has been a failure of mineral title, the royalty reservation should not inure to the lessee but should be reduced pro rata.

F. Distinction Between Applicability to Mineral and to Royalty Interests

It should be noted that in *deed* situations, the after-acquired title doctrine is applicable regardless of whether the reservation is one of

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[90]Barber, *Duhig to Date: Problems in Conveyancing of Fractional Mineral Interests*, 13 Sw. L.J. 320, 340 (1959).

[91]1 Williams & Meyers, Oil and Gas Law § 316.4, at 635 (1964).

[92]*Ibid.*

[93]*Id.* at 647-48.

[94]*Id.* at 648.

[95]303 S.W.2d 341 (Tex. 1957).

[96]*Id.* at 346.

"minerals" or of "royalty." Also, the proportionate reduction clause should be applied only where it is expressly provided for.[97]

In *lease* situations, the fulfillment of the intentions of the parties calls for a distinction between failure of mineral title and failure of royalty title and requires a different construction of the instrument, depending upon which interest has failed. When there is a failure of royalty title, the reserved royalty is reduced by subtraction; when there is a failure of mineral title, the reserved royalty is reduced pro rata.[98] In each case, the final result is the same—the fulfilling of the intention of the parties. The proportionate reduction clause should be read into every lease, when not expressly provided for, since it would indicate the unusual intention of the parties. If proportionate reduction were not intended, the lease should expressly so state.[99]

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[97] 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 316.5, at 647 (1964).
[98] *Id.* § 316.4, at 635.
[99] *Id.* § 316.5, at 648.

APARTMENT HOUSE LEASING IN MISSISSIPPI

I. Introduction

It is the purpose of this comment to examine Mississippi's law of landlord and tenant and its effect on the leasing of multi-family housing. The current trend toward apartment house living illustrates the importance of this area of the law.[1] For those who own apartment houses, the relationship which they occupy toward their tenants is the cornerstone for large amounts of capital investment. Also, the daily lives of thousands of tenants are intimately affected by this relationship. Obviously, there is a need for modern, workable rules of law in this area.

To a great degree, the obligations existing between landlord and tenant are determined by the lease they execute. For this reason, a number of lease provisions have been included in this article to illustrate the writer's conclusions as to the present requirements of Mississippi law. It should, however, be emphasized that this form is not intended as a model for other leases. It is included merely as an aid to be consulted to avoid omission of relevant provisions.

II. Background

The typical apartment house lease grants to the tenant an interest in land which continues for a stated number of months or years. This interest, referred to as a term of years,[2] is of ancient origin.

In England the term of years was originally used to circumvent the Church's prohibition against usury. To accomplish this, a landowner who had borrowed money would give his creditor the right to use all or part of his lands for a period of time. During this term the lender would recover the amount of his loan, and a profit, out of the land's revenue.[3] Because of this devious arrangement, the termor, or tenant, was given little protection by the common law and, until the end of the fifteenth century, was denied the use of real actions to defend his term.[4]

It is unreasonable to say that this ancient distrust of termors is reflected in our present laws of landlord and tenant. However, it is interesting to note that the title of one of Mississippi's early enactments in this field began: "An act for the better Securing the Payment of Rents, and Preventing the Fraudulent Practices of Tenants . . . ."[5] This act, along with most of Mississippi's other landlord and tenant legis-

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[1]In 1960 there were approximately 54,000 units of multi-family housing in Mississippi. Letter from Catherine E. Martini, Director of Research, National Association of Real Estate Boards, to Guy B. Taylor, August 8, 1966.

[2]See generally Bennett, Landlord and Tenant § 57 (1939).

[3]See Lesar, Landlord and Tenant § 3.1, at 175 (1957).

[4]Plucknett, A Concise History of the Common Law 573-74 (5th ed. 1956).

[5]Miss. Laws 1822, ch. 56, art. 5.

lation, originated well before the end of the nineteenth century. The economic conditions existing in the state from 1865 to 1900 provide the background for most of our present landlord and tenant statutes.[6]

> During the chaotic political and economic conditions which followed the war, the southern planters were compelled to find a new system of farming which would permit them to make a profitable use of their one remaining important asset, the land. The Negroes were trained in the rudiments of farming but were unable to employ their capabilities without land and supervision. Therefore it was expedient for these two groups, the landowners and the freedmen, to make arrangements by which each group could utilize skills possessed in abundance by the other. . . . The tenancy or cropper contract was deemed the best method to accomplish this purpose, and at the same time to provide a remedy of some sort for the broken economy of the war-torn South.
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> . . . . The landowners were anxious to find some method by which they would be assured of collecting the rent. It was generally believed, and not without reason, that the freedmen were not sufficiently conversant with business practices to be financially responsible, and that they would break their contracts and dispose of the crops to another party, leaving the landlord with an uncollectible debt. Seeking to prevent such acts on the part of tenants and to guarantee the landowner security for the indebtedness, a common form of legislation was provided affording the landlord a lien for rent and advances on the crops grown on the leased premises. Thus the common-law remedy of distress, in the states where it was available, was supplemented and the rights of the landlord made more secure.[7]

In Mississippi, the landlord is given a lien on all crops grown on his land[8] and on any equipment or livestock which he furnishes to his tenant.[9] Also, the landlord is entitled to collect any unpaid rent before a third party may levy on the tenant's goods located on the leased property.[10] It is apparent that these priorities were designed with the agrarian landlord in mind. These provisions, and others, will be discussed in the succeeding sections, and an attempt will be made to evaluate their utility and fairness when applied to apartment house leasing.

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[6]For a description and statistical analysis of the state immediately following the Civil War see Miss. Bd. of Immigration and Agriculture, Handbook of the State of Mississippi (1882).

[7]Mangum, The Tenant Farmer in the Southeast 246-47 (1952).

[8]Miss. Code Ann. § 908 (1956).

[9]Miss. Code Ann. § 909 (1956).

[10]Miss. Code Ann. § 897 (1956).

III. Incidents of the Lease

Leases of real property have traditionally been thought of as conveyances rather than contracts.[11] However, the more modern writers,[12] and the courts,[13] now regard the tenancy relationship as one arising out of contract. While the lease contract does grant to the tenant an estate in land,[14] it also embodies an agreement between the parties for the continuous performance of certain duties.[15] It is submitted that, on this basis, the lease is properly regarded as a type of contract.

In Mississippi no particular form of words is necessary to create the relationship of landlord and tenant.[16] All that is required is that an intention be expressed that one party grants possession of his property to another for a certain period of time.[17] Of course, the lease must also conform to the general requirements of contracts. For example, it must be supported by consideration,[18] the parties thereto must be competent,[19] and its objective must not offend public policy.[20]

While it is not essential that a lease be in writing, the Statute of Frauds prohibits enforcement of oral leases made "for a longer term than one year."[21] The effect of this portion of the statute has been lessened by judicial decision. In one instance a tenant under an oral five year lease was held to be a tenant from year to year.[22] There the tenant had signed five annual rent notes and was given notice to vacate less than a month before the beginning of the fifth year of his term. The court, noting the apparent injustice of such an eviction, held that the tenant was entitled to the two months' notice[23] required for tenants from year to year and, in the absence of such notice, retained a valid right to possession for the fifth year. It appears that the tenant could not have relied upon the doctrine of part performance to defend his term,[24] and the court may have considered this in reaching its decision. The

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[11]See 1 Tiffany, Landlord and Tenant § 16, at 160-62 (1912).

[12]See Bennett, Landlord and Tenant § 1, at 18 (1939).

[13]*E.g.*, Chaney v. Whitney, 107 So. 2d 471 (La. Ct. App. 1958).

[14]Mangum, The Tenant Farmer in the Southeast 36 (1952).

[15]Bennett, Landlord and Tenant § 1, at 19 (1939).

[16]Hancock County v. Imperial Naval Stores Co., 93 Miss. 822, 833, 47 So. 177, 179 (1908).

[17]*Ibid.*

[18]See Ogle v. Durley, 223 Miss. 32, 43, 77 So. 2d 688, 693 (1955).

[19]See Wigley v. Wigley, 58 So. 2d 59 (Miss. 1952).

[20]See Lavecchia v. Tillman, 115 Miss. 288, 76 So. 266 (1917).

[21]Miss. Code Ann. § 264 (1956). See also Miss. Code Ann. § 832 (1956).

[22]Scruggs v. McGehee, 110 Miss. 10, 69 So. 1003 (1915).

[23]Miss. Code Ann. § 946 (1956).

[24]See Washington v. Soria, 73 Miss. 665, 673, 19 So. 485, 486 (1896). See generally 49 Am. Jur. *Statute of Frauds* § 425 n.12 (1956).

court has also determined that the statute's language refers to the length of the term rather than the period between the making of the contract and the end of the tenancy.[25] Thus, an oral lease for a term of exactly one year is good against the Statute of Frauds even though executed prior to the first day of the term.[26] The practical importance of reducing to writing any lease, even for a year or less, will be considered in the section on drafting.

Under Mississippi's recording laws, a lease for a term of years must be acknowledged and recorded in order to be valid against "creditors and subsequent purchasers for a valuable consideration without notice . . . ."[27] Thus, a tenant may not enforce an unrecorded lease against one who, without notice of the tenancy, purchases the land from the landlord and then files his deed.[28] The same appears to be true where the third party is a creditor of the landlord and levies on the land without notice of the tenant's lease.[29] However, it appears that the safeguard of recordation is not generally employed by tenants, except in instances of long term leases of property of substantial value.[30] Since, as previously noted, demises for one year or less need not be in writing, it seems apparent that many valid leases are not capable of being recorded. Fortunately, the Mississippi court has greatly reduced the possibility of abusive use of the statute by placing a broad interpretation on the requirement that the creditor or purchaser not have notice of the tenancy. In this respect it has been said that actual possession of the land by the tenant is constructive notice of his estate therein.[31] It, therefore, appears that the term of a tenant in possession will be protected even though he has not complied with the recording act.

A landlord may, during the term of a lease, convey his reversionary interest in the property.[32] It is not necessary for the landlord to obtain his tenant's consent before making such a conveyance[33] although the tenant becomes obligated to pay rent to a different party.[34] After such

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[25]McCroy v. Toney, 66 Miss. 233, 5 So. 392 (1888).

[26]*Ibid.*

[27]Miss. Code Ann. § 868 (1956).

[28]*Ibid.*

[29]*Ibid.*

[30]This writer examined the index of land deeds for Lafayette County, Mississippi, and found no apartment leases filed for record during 1965. There is a relatively large number of multi-family housing units in this county, but only sixteen non-mineral leases were recorded during this period and most of these were long-term leases of commercial property.

[31]Kalmia Realty & Ins. Co. v. Hardy, 164 Miss. 313, 145 So. 506 (1932).

[32]Cheairs v. Coats, 77 Miss. 846, 28 So. 728 (1900).

[33]Miss. Code Ann. § 905 (1956).

[34]Bloodworth v. Stevens, 51 Miss. 475, 480 (1875).

a transfer the tenant is responsible to a new landlord, but in most other respects, the tenancy remains unchanged.[35]

Even in the absence of any breach by the landlord, the tenant may wish to relieve himself of his obligations under the lease. There are three ways in which this may be attempted: surrender; assignment; and sub-lease. A surrender of the tenancy is in the nature of a mutual cancellation of the contract, and it is necessary that both parties consent to the transaction. No particular form of expression is required to accomplish a surrender, but it must clearly appear that the parties have acceded to the cancellation and that the landlord has resumed possession or control.[36] The situation which arises most frequently is the attempted surrender by a tenant who abandons the premises and refuses to continue paying rent. It appears that in such circumstances the landlord may allow the lands to remain vacant and continue to hold his tenant liable for the rent.[37] If the landlord re-leases the land at a lower rental, the first tenant remains responsible for the difference.[38]

The tenant may attempt to shift his responsibilities under the lease to another party by assignment. An assignment occurs when the tenant transfers his entire interest in all or part of the leased premises.[39] Although the estate is then transferred to a third party, the tenant is not absolved of liability under his lease. He is charged with responsibility for performance of the lease contract by the assignee, and his status is similar to that of a surety.[40] The assignee, while not a party to the original lease contract, is in privity of estate with the landlord.[41] Because of this relationship, the assignee is bound by those covenants in the original lease which can be said to run with the land.[42] The assignee is not bound by mere personal covenants which do not affect the estate.[43] Covenants which have been held to run with the land include covenants to pay rent, repair the premises, renew the lease, and deliver up the premises in good condition.[44] However, in every instance it is necessary

[35]Hytken v. Bianca, 186 Miss. 323, 188 So. 311 (1939).

[36]MANGUM, THE TENANT FARMER IN THE SOUTHEAST 70 (1952); see Alsup v. Banks, 68 Miss. 664, 9 So. 895 (1891).

[37]Alsup v. Banks, 68 Miss. 664, 9 So. 895 (1891).

[38]*Ibid.*

[39]Doty v. Heth, 52 Miss. 530 (1876); BENNETT, LANDLORD AND TENANT § 284, at 401 (1939).

[40]LESAR, LANDLORD AND TENANT § 3.61, at 310-11 (1957); see, *e.g.*, Keith v. McGregor, 163 Ark. 203, 259 S.W. 725 (1924).

[41]*Ibid.*

[42]See Doty v. Heth, 52 Miss. 530 (1876).

[43]*E.g.*, Latses v. Nick Floor, Inc., 99 Utah 214, 104 P.2d 619 (1940).

[44]See BENNETT, LANDLORD AND TENANT §§ 197-206 (1939).

to examine the particular circumstances surrounding the covenant, and the test to be applied is often unclear.[45]

It is also possible for the tenant to sub-lease the premises. A sub-lease exists when the tenant transfers an estate less than that which he possesses.[46] This tranaction creates a new and separate tenancy wherein the original tenant becomes a landlord in his own right. The tenant remains liable under the first lease and the sub-tenant, who is in neither privity of estate nor privity of contract with the primary landlord, cannot ordinarily be held responsible for breach of the covenants contained in the primary lease.[47] However, the rights of the landlord cannot be defeated by a sub-lease, and the sub-tenant may be dispossessed upon termination of the primary lease.[48] Although the sub-tenant is not personally responsible for the payment to the landlord of the rent specified in the original lease, the landlord's lien on agricultural products grown on the leased premises[49] has been held to extend to crops grown by sub-tenants.[50] The sub-tenant's crops are encumbered by the lien because of the scope of the statute and not because the sub-tenant is personally liable for the payment of rent to the primary landlord.[51] Because the sub-tenant's crop is subject to this lien, he occupies the position of surety for the payment of rent to the primary landlord, but only to the extent of his crop's value.[52] These decisions do not appear to impose any liability upon the sub-tenant beyond that directly created by the crop lien statute. It has been held that the primary landlord's remedy of distraint may not be exercised against a sub-tenant.[53] Thus, the sub-tenant's chattels, other than agricultural products grown on the premises, may not be seized to satisfy rent owing to the primary landlord.[54]

At common law the tenant's right to assign or sub-lease was generally recognized.[55] There is no statutory prohibition against such transfers in Mississippi. Therefore, unless the lease specifically restricts this right, the tenant is free to bring a third party into the tenancy without obtain-

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[45]There is, for example, a conflict as to whether a covenant restricting assignments runs with the land. *Compare* Taylor v. Odell, 50 Cal. App. 2d 115, 122 P.2d 919 (Dist. Ct. App. 1942), *with* Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 19 N.Y. S. 2d 981 (Sup. Ct. 1940).

[46]*E.g.*, Doty v. Heth, 52 Miss. 530 (1876).

[47]1 TIFFANY, LANDLORD AND TENANT § 162, at 1000-01 (1912).

[48]*Ibid.*

[49]MISS. CODE ANN. § 908 (1956).

[50]Hooks v. Burns, 168 Miss. 723, 731, 152 So. 469, 472 (1934).

[51]Applewhite v. Nelms, 71 Miss. 482, 14 So. 443 (1893).

[52]Hooks v. Burns, 168 Miss. 723, 731, 152 So. 469, 472 (1934).

[53]Ashley v. Young, 79 Miss. 129, 29 So. 822 (1901).

[54]*Ibid.*

[55]See MANGUM, THE TENANT FARMER IN THE SOUTHEAST 54-55 (1952).

ing the landlord's consent.[56] The following hypothetical situations are directed toward illustrating the nature of such transfers and the pitfalls inherent in them. The procedural aspects of the landlord's remedies, which will be considered in the succeeding section, have been simplified in these examples.

Assume that *A* leases an apartment to *B* for a term of one year with the rent due on the first day of each month. In the lease the tenant agrees that he will not use the premises in any manner deemed hazardous by the landlord's insurers. The lease also provides that if the tenant does use the premises in such a manner, the landlord may terminate the tenancy and evict the tenant. The tenant also agrees to reimburse the landlord for any attorney's fees incurred by virtue of such an eviction. After occupying the apartment for six months, *B* enters into an agreement whereby he transfers to *C* all of his interest in the tenancy for the remaining six months of his term. No notice is given to *A*, but *C* moves into the apartment and pays the rent on the first of the month. *C* installs a short wave radio antenna in a window in his apartment. An inspector from *A*'s insurance company notices the antenna and informs *A* that his premium will be raised because the antenna increases the likelihood that the building will be struck by lightning. *A* notifies *C* that the tenancy has been terminated under the "hazardous use" covenant. *C* refuses to move and *A* brings an action for possession of the premises and to recover his attorney's fees incurred in the suit.

C holds the apartment under an assignment from *B*. If *B* had given *C* a right to use the premises for only four of the remaining six months of the term, the transfer would have amounted to a sub-lease.[57] Since *B* transferred his entire remaining interest in the tenancy, an assignment was created, and *C* is bound by all the covenants in the original lease which run with the land.[58] It appears that the covenant against hazardous use would run with the land;[59] therefore, *A* should succeed in his suit to dispossess *C*. However, the covenant to pay attorney's fees in case of a litigated eviction is a mere personal covenant which does not run with the land and cannot be enforced against *C*.[60]

After this series of events, *A* has a new lease drafted which contains this clause: "The tenant agrees that he will not assign his interest in the leased premises to any other party and that, if he does so assign his interest, the landlord may terminate the tenancy and place himself in possession of the premises." *A* also includes this provision, intending

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[56]*Ibid.*

[57]See 1 TIFFANY, LANDLORD AND TENANT § 151, at 907-08 (1912).

[58]*E.g.*, Edwards v. Altmayer, 31 Ala. App. 459, 18 So. 2d 471 (1944).

[59]See Glennmore Distilleries Co. v. Fiorella, 273 Ky. 549, 117 S.W.2d 173 (1938).

[60]Latses v. Nick Floor, Inc., 99 Utah 214, 104 P.2d 619 (1940).

to simplify the manner of renewing leases at the end of each term: "It is mutually agreed that if the tenant holds over for three days after the end of the term specified herein without objection from the landlord, then this lease shall be automatically renewed for a period of one year on the same terms and conditions as are contained herein." *A* leases an apartment to *D* for one year at $100 per month, and they execute one of the new lease forms. After six months' occupancy, *D* transfers to *E* all his right to occupy the apartment for the remaining six months of the term. Under their agreement, *E* pays D $110 rent each month. *D* continues paying $100 each month to *A* but does not notify him of the change in occupancy. At the end of the term, *E* continues to occupy the apartment for four days without objection from *A* and then notifies *A* that he intends to rent the apartment for another year under the automatic renewal clause. *A* immediately begins an action to recover possession of the apartment.

The transfer from *D* to *E* did not constitute an assignment. Since *D* required *E* to pay a greater rent than that specified in the primary lease, *D* retained an interest in the estate. By reserving this interest, *D* created a sub-lease rather than an assignment.[61] Since the provision in the primary lease forbidding assignments does not prohibit sub-leasing, *D* was competent to exercise his common law right to rent the premises to an under-tenant.[62]

The landlord could not have ousted *E* from the premises during the term of the primary lease, so long as its covenants were not breached.[63] However, since the term of the primary lease has ended, *A* may now regain possession of the apartment. The sub-tenant is not in privity of contract with the primary landlord and may not avail himself of a clause in the lease between *A* and *D*.[64] Even if *E* stood in the position of an assignee of the lease, he could not claim the benefit of this clause which is said merely to prescribe a manner in which renewal could be accomplished. It does not constitute a covenant running with the land.[65]

While it would not be possible to illustrate the myriad difficulties which arise from assignments and sub-leases, the foregoing examples show that such transactions can and do create disputes which often outweigh the economic worth of the tenancy. The essence of the problem is that the landlord cannot be certain that the tenancy relationship will remain constant during the term. If the tenant can assign or sub-lease, then he can, as a practical matter, substitute another in his place under the

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[61]Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P.2d 336 (1951).

[62]1 TIFFANY, LANDLORD AND TENANT § 152, at 922 (1912).

[63]BENNETT, LANDLORD AND TENANT § 303, at 431 (1939).

[64]*Id.* § 304, at 431.

[65]Iowa Implement Co. v. Aetna Explosives Co., 181 Iowa 1186, 165 N.W. 408 (1917).

lease contract. The rights and obligations of this party are not necessarily the same as those of the primary tenant. When such transfers are allowed, the landlord has no realistic assurance that the lease will continue to govern the relationship throughout the term. It appears that the preferable course is to prohibit the making of assignments or subleases without the consent of the landlord. This question will be referred to again in the section on drafting.

In evaluating the overall utility of Mississippi's present tenancy laws, it is important to be aware of the differences between the position of the agrarian landlord, for whom our statutes seem to have been designed,[66] and that of one engaged in renting multi-family housing. The farm lease has as its ultimate objective the production of profitable crops. In return for use of the land, the tenant pays the landlord either a share of the crop or a specified cash rental, the latter usually being payable when the crop is sold at the end of the term. As a practical matter, the source of the agrarian landlord's rental income is the crop, not the tenant's personal fortune. In this respect it is significant that the only liens granted to the landlord by statute are those upon agricultural products and implements furnished to the tenant.[67]

The farm tenant depends upon the crop for his livelihood. The full value of the crop cannot be realized until it has matured and been harvested. Therefore, the tenant who deserts the premises to escape the payment of rent also loses the fruits of his labors. Under these circumstances, the liens and other statutory priorities seem to provide the agricultural landlord with adequate protection.

The apartment lease is, by contrast, directed toward an entirely different proposition. The tenant's financial ability to fulfill his lease contract depends on his personal resources rather than the successful use of the leased property. Obviously, the agrarian liens are empty rights in the hands of the apartment lessor. Since the statutes grant no lien other than those on crops, livestock, and implements, it is imperative that the apartment house landlord be afforded a speedy means of obtaining judicial assistance in enforcing the lease contract. Of course, such proceedings should not move so quickly that the tenant is deprived of an opportunity to defend his position. The need for a fast and inexpensive action upon which the landlord may rely is evidenced by the fact that the apartment tenant, unlike the farm tenant, suffers little or no economic loss by abandoning his tenancy. An apartment does not represent an investment of the tenant's labors, and there is nothing located on the premises which he must nurture in order to realize a financial benefit. In reality the apartment tenant is bound

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[66]See notes 7-10 *supra* and accompanying text.

[67]MISS. CODE ANN. §§ 908-09 (1956).

to his tenancy only by the lease contract. Thus, the apartment house landlord's security depends solely upon his ability to enforce the terms of the lease. The following section is directed toward evaluating the effectiveness of the landlord's present remedies.

IV. Possessory Actions

The legislature has provided the landlord with two summary actions by which he may evict a tenant. These are unlawful entry and detainer[68] and the statutory eviction proceedings under the landlord and tenant laws.[69]

A. Unlawful Entry and Detainer

1. *Nature and Requisites of the Action*

Unlawful entry and detainer can be used to oust a tenant only where he continues in possession of the land after his right to do so has expired.[70] Our court has held that the action may be maintained only in the cases specifically covered by statute.[71] It thus appears that the action will not lie where the tenant has defaulted in the payment of rent or otherwise breached a covenant in his lease, unless the lease provides that the tenancy is terminated by such breach. If the landlord does have a good right to possession, he may maintain the action and also recover, as a part of the judgment of possession, any rent in arrears or, in the absence of an agreed rental, the reasonable value of the land's use during the time possession was withheld.[72] Statutory double rent may be recovered in this manner from a holdover tenant.[73]

The landlord must begin his action within one year after the cause accrues, or his suit will be barred.[74] If the tenancy is to terminate at a definite time, the landlord need not make demand for possession to establish his right to sue in unlawful entry and detainer[75] or to perfect his right to claim double rent.[76] The tenant cannot defeat the landlord's claim for rent by surrendering possession of the land.[77]

Original jurisdiction over unlawful entry and detainer actions is

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[68]Miss. Code Ann. §§ 1033-58 (1956).

[69]Miss. Code Ann. §§ 948-58 (1956).

[70]Miss. Code Ann. § 1033 (1956).

[71]Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383 (1899).

[72]Miss. Code Ann. § 1043 (1956).

[73]Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1945).

[74]Miss. Code Ann. §§ 1033, 1049 (1956).

[75]Price v. Moss, 214 Miss. 253, 58 So. 2d 661 (1952); Miss. Code Ann. § 946 (1956).

[76]See Miss. Code Ann. §§ 946-47 (1956).

[77]See Cahn v. Wright, 108 Miss. 420, 66 So. 782 (1914).

vested in the county courts[78] and in a special court comprised of three justices of the peace serving in the county where the land is located.[79]

2. *Suit Filed in County Court*

When unlawful entry and detainer is brought in a county court, the following procedure is employed. The landlord begins the action by filing a verified complaint[80] in the court. This complaint is sufficient if drawn in the language of the statute,[81] but it must also describe the land in question accurately enough that an officer can locate the premises, in order to remove the tenant, if the plaintiff is successful.[82] The landlord may recover the rent in arrears on the property even though his complaint does not demand it. Rent is considered an incident to the suit, and the statute[83] gives the tenant adequate notice that a claim for rent may be made at the trial.[84] Filing the complaint is sufficient to put the cause in issue and no further pleading is required.[85] After the complaint is filed, a warrant[86] is issued directing the tenant to appear and defend the suit. The warrant cannot be returnable later than ten days after issuance, provided, however, that the tenant must be served at least five days before the return date.[87] The judge of the county court tries the case without a jury.[88] If he finds for the landlord, a judgment is rendered awarding possession of the land and recovery of the amount proved as arrears of rent and costs.[89] The court has the power to enforce its judgment and punish for contempt, but no execution may issue for five days after the judgment is rendered.[90]

An appeal may be taken from the county court to the circuit court. However, this appeal is governed by the general statute on appeals from county court[91] rather than by the statute dealing specifically with appeals from the justices' court of unlawful entry and detainer.[92] Thus, the party wishing to appeal from a judgment of the county court has

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[78]Miss. Code Ann. § 1051 (1956).

[79]Miss. Code Ann. §§ 1036, 1041 (1956).

[80]See Miss. Code Ann. § 1051 (1956).

[81]Torrey v. Cook, 11 Miss. (3 S. & M.) 60 (1844).

[82]Paden v. Gibbs, 88 Miss. 274, 40 So. 871 (1906). For an example of an insufficient description see Price v. Moss, 214 Miss. 253, 58 So. 2d 661 (1952).

[83]Miss. Code Ann. § 1054 (1956).

[84]Stollenwerck v. Eure, 120 Miss. 233, 82 So. 68 (1919).

[85]Holmes v. Elmer, 182 Miss. 171, 181 So. 325 (1938).

[86]Miss. Code Ann. § 1052 (1956).

[87]Miss. Code Ann. § 1053 (1956).

[88]Miss. Code Ann. § 1054 (1956).

[89]Miss. Code Ann. §§ 1054-55 (1956).

[90]Miss. Code Ann. § 1055 (1956).

[91]Miss. Code Ann. § 1616 (1956).

[92]McCandless v. Day, 162 Miss. 859, 140 So. 337 (1932).

ten days to perfect an appeal,[93] but only five days if his action was tried in the justices' court.[94] Since the provision for suing for unlawful entry and detainer in the county court appears to be an alternative to bringing suit before the special justice of the peace court, this difference in appeal procedure does not seem to be supported by legislative intent.[95] This is particularly so when considered in light of the requirement that the county court refrain from enforcing a judgment for the plaintiff for only five days.[96] Under these circumstances it appears that the landlord may enforce his judgment by having the tenant removed from the land and by attachment for the judgment debt, despite the fact that the tenant's right to appeal has not expired and that such an appeal will probably act as a supersedeas.[97]

In the circuit court the case is reviewed as is any other case on appeal from the county court. If prejudicial error is found in the record, the cause may be set for trial de novo in the circuit court.[98] A number of questions concerning the rights of parties on appeal have been settled in regard to cases from the special justices' court. However, these questions have not been settled in instances where the appeal is from the county court. For example, it appears that where an aggrieved tenant appeals from the special justices' court, the landlord may make a claim for rent in the circuit court even though no such claim was made at the first trial.[99] Where the tenant appeals from the justices' court and remains in possession under supersedeas, the rent which the landlord may recover continues to accrue until the date of the final judgment, even if carried to the state supreme court.[100] These points have not been conclusively determined where the appeal is taken from a county court. As previously noted, it has been held that in actions of unlawful entry and detainer the time for appeal from the county court is not the same as that for appeal from the special justices' court.[101] Although the actions are the same in both forums, different statutes govern the right to appeal. Because of this situation, it is not clear whether all the unlawful entry and detainer cases decided on appeal from the special justices' courts are valid precedents for appeals from county courts.

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[93] *Ibid.*

[94] *Ibid.*; MISS. CODE ANN. § 1197 (1956).

[95] See brief for Appellees, pp. 861-63, McCandless v. Day, 162 Miss. 859 (1932).

[96] MISS. CODE ANN. § 1055 (1956).

[97] MISS. CODE ANN. §§ 1169, 1616 (1956); see Sartin v. Barlow, 196 Miss. 159, 167-68, 16 So. 2d 372, 376 (1944).

[98] MISS. CODE ANN. § 1616 (1956).

[99] Stollenwerch v. Eure, 119 Miss. 854, 81 So. 594 (1919).

[100] Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).

[101] See notes 91-94 *supra* and accompanying text.

3. *Suit Filed in Special Justices' Court*

If the unlawful entry and detainer suit is not brought in the county court, a different procedure will be followed. As in the county court, the plaintiff must be unlawfully deprived of possession of his lands before he can maintain the suit.[102] The landlord may begin the action by filing a verified complaint before any justice of the peace in the county where the land is located.[103] The substance of the complaint is essentially the same as those filed in county court.[104] However, when such a complaint is filed, the justice of the peace must organize a special court to hear the cause. To do this, he directs a warrant to an officer requiring him to notify two other justices of the peace in that county of the date when the cause will be heard, and to request their attendance. This warrant also directs the officer to summon the defendant.[105] The warrant must be returnable not less than five days nor more than twenty days after issuance.[106] Any justice of the peace who does not obey the warrant may be fined $20.[107] Despite this, the statutes also provide that "any two justices of the county"[108] may constitute the special court. If only two justices hear the case and they cannot agree, the decision of the justice who received the complaint is controlling.[109]

As in county court, only the verified complaint is necessary to bring the cause to trial and no other written pleadings are required.[110] If the landlord prevails, he may recover any rent in arrears, including statutory double rent,[111] as a part of his judgment for possession.[112] However, no execution may be had on the judgment for five days after its rendition.[113]

An appeal may be taken to the circuit court from the justices' court under the special provisions of section 1197.[114] To perfect this right, the appellant must make a sufficient appeal bond within five days after the judgment is rendered. Such an appeal operates as a supersedeas.[115]

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[102]Miss. Code Ann. § 1033 (1956).

[103]Miss. Code Ann. § 1035 (1956).

[104]*Ibid.*

[105]Miss. Code Ann. § 1036 (1956).

[106]Miss. Code Ann. § 1038 (1956).

[107]Miss. Code Ann. § 1037 (1956).

[108]Miss. Code Ann. § 1041 (1956).

[109]Miss. Code Ann. § 1047 (1956).

[110]Miss. Code Ann. § 1042 (1956).

[111]Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1946).

[112]Miss. Code Ann. §§ 1043-44 (1956).

[113]Miss. Code Ann. § 1044 (1956).

[114]Miss. Code Ann. § 1197 (1956).

[115]*Ibid.*

In the circuit court the case is tried on the merits[116] and the landlord may recover rent accruing until the final judgment on appeal.[117]

The justices' court which entertains suits for unlawful entry and detainer is a special statutory court with narrow subject matter jurisdiction. It is referred to as a court of record and is given certain powers customary for such tribunals.[118] However, it exists only to try the case for which it is assembled. It is dissolved after rendering judgment and has no power to grant a new trial.[119] It is not a justice of the peace court, although those officers act as its judges.

The basis of its existence is the legislature's authority to create necessary inferior courts.[120] Under this authority the legislature can grant such courts concurrent jurisdiction with the circuit courts so long as the circuit courts retain the power of review over them.[121] It seems possible that the unlawful entry and detainer court is of this nature and thus is not limited to the jurisdictional amount which restricts justice of the peace courts.

Such appears to be the conclusion reached in regard to a similar special court created by the landlord and tenant laws and composed of a single justice of the peace, mayor, county court judge, or police court judge.[122] Since the decision of an unlawful entry and detainer court may be that of only one justice of the peace,[123] the two courts' personnel would in many instances be the same. These special courts, usually presided over by justices of the peace, are allowed to award possession of land worth far more than $200 because their judgments do not constitute adjudications of title.[124] However, in the same actions these courts are also empowered to render money judgments for arrears of rent. It cannot be doubted that such claims will often exceed $200, particularly when statutory double rent is owed. Unfortunately, there appears to be no decisive authority which determines whether a justice of the peace may, in his capacity as judge of one of these special courts, render a valid money judgment in excess of $200. The language of the opinions infer that they do have such power,[125] but the question is by no means settled.

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[116] *Ibid.*

[117] Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).

[118] Miss. Code Ann. § 1041 (1956).

[119] Warren v. Trustees of African Baptist Church, 50 Miss. 223 (1874).

[120] Rabe v. Fyler, 18 Miss. (10 S. & M.) 440, 446 (1848); Miss. Const. art. 6, § 172.

[121] *Cf. Ex parte* Tucker, 164 Miss. 20, 143 So. 700 (1932).

[122] See Miss. Code Ann. § 948 (1956).

[123] Miss. Code Ann. § 1047 (1956).

[124] See Vansant v. Dodds, 164 Miss. 787, 145 So. 613 (1933).

[125] See Stollenwerch v. Eure, 119 Miss. 854, 867-68, 81 So. 594, 595-96 (1919).

B. Statutory Eviction

1. *Nature and Requisites of Action*

In addition to the action for unlawful entry and detainer, the landlord has a possessory remedy under the landlord and tenant statutes.[126] This statutory eviction proceeding is broader in scope than unlawful entry and detainer. Statutory eviction under section 948 may be had if the tenant continues in possession after his term ends or if he defaults in the payment of rent during the term. Before the landlord may evict for default of rent, he must show that: (1) the rent is due and unpaid; *and* (2) the debt cannot be satisfied by distress of the tenant's goods; *and* (3) three days' notice in writing has been served on the tenant, demanding that he pay the rent or surrender possession.[127]

Section 948 does not expressly give the landlord the right to recover a money judgment for rent as a part of the proceeding. The only relief specifically authorized by this section is eviction.[128] However, it has been held that no particular type of action is necessary for the recovery of single rent, or statutory double rent.[129] As a matter of common practice, the landlord is allowed to recover a judgment for rent, as well as possession of the property, in an action under section 948.[130] This interpretation is highly desirable, since it allows the entire dispute between the parties to be settled in one action.

Suits under section 948 are heard by a special court presided over by either a justice of the peace, mayor, police justice, or county court judge.[131] Its procedure is similar to that of actions for unlawful entry and detainer.

2. *The Affidavit*

The landlord begins the suit by filing an affidavit to remove. This affidavit must be drawn with extreme care so that it will strictly comply with the statute.[132] The statute provides that the affidavit may be made by the landlord's agent.[133] However, where the affidavit is made by an agent, it must not be drafted as though it were the personal act of the landlord.[134] The following examples illustrate what appear to be sufficient affidavits for the two causes arising under section 948.

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[126]Miss. Code Ann. § 948 (1956).
[127]*Ibid.;* Wilson v. Wood, 84 Miss. 728, 36 So. 609 (1904).
[128]Miss. Code Ann. § 948 (1956).
[129]Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1946).
[130]See Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).
[131]Miss. Code Ann. § 948 (1956).
[132]See Downing v. Campbell, 131 Miss. 137, 95 So. 312 (1922).
[133]Miss. Code Ann. § 949 (1956).
[134]See Downing v. Campbell, 131 Miss. 137, 95 So. 312 (1922).

The first affidavit is applicable to situations where the tenant refuses to move at the end of the term. It should be noted that the hypothetical lease has a definite termination date, thus making notice to vacate unnecessary either as a prerequisite to eviction[135] or to entitle the landlord to double rent.[136] The statute requires only that the tenant "continue in possession . . . after the expiration of his term"[137] and there appears to be no reason why a tenancy may not be terminated, pursuant to the conditions of the lease, at any time after it begins. However, for the purpose of the following affidavit, a holding over beyond the end of the specified term has been assumed. The affidavit is drafted for a corporate landlord and claims statutory double rent.

Affidavit to Remove

State of Mississippi
County of Lafayette

Before the undersigned justice of the peace of said county comes A. B.[138] who, being duly sworn, says on oath that:

(1) He is the vice-president of C., Inc., a corporation authorized to do business in the state of Mississippi.

(2) C., Inc., the landlord, rented an apartment dwelling to D. E., the tenant, for a term of one year beginning on January 1, 1965, and ending at midnight on December 31, 1965;[139] for an agreed rental of $60 per month, payable on or before the first day of each month. Said apartment dwelling is more fully described as apartment number 204-A on the second floor of a building known as the "C. Apartment House," located at 1600 Main Street, Oxford, Lafayette County, Mississippi, and being the apartment occupied by said tenant.[140]

(3) Although the tenant's term has expired, he is holding over and continuing in possession of the leased premises without the permission of the landlord.[141]

(4) By virtue of the tenant's failure to quit the premises and deliver up the same at the end of his term, he is indebted to the landlord in the amount of $120 for each month or part

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[135]Miss. Code Ann. § 946 (1956); see Bowles v. Dean, 84 Miss. 376, 36 So. 391 (1904).

[136]See Miss. Code Ann. §§ 946-47 (1956).

[137]Miss. Code Ann. § 948 (1956).

[138]See notes 133-34 *supra* and accompanying text.

[139]The affidavit must exhibit facts sufficient to show the relationship of landlord and tenant and specify the term of the lease. Bowles v. Dean, 84 Miss. 376, 36 So. 391 (1904).

[140]A description of this type appears to be adequate for most apartments. However, the test is whether an officer could locate the property from the description given without other inquiry. In some circumstances a more detailed description may be necessary. See note 82 *supra*.

[141]See Miss. Code Ann. § 948 (1956).

thereof during which said tenant has continued in possession beyond the end of his term.[142]

A. B., agent for C., Inc.

Subscribed and sworn to before me this _____ day of _____, 19____.
(seal)

F. G., Justice of the Peace

An action under the second part of section 948 is based on the tenant's default in the payment of rent. But the affidavit must show that the rent cannot be satisfied by distress and that the tenant has been given three days' notice before the affidavit was made. In other respects the requirements of the affidavit are the same as for that in an action under the first part of section 948. Since the tenant's right to possession has not terminated, he may not be held liable for double rent. The following affidavit illustrates the initiation of suit against a tenant who has defaulted in the payment of rent.

Affidavit To Remove

State of Mississippi
County of Lafayette

Before the undersigned justice of the peace of said county comes A. B. who, being duly sworn, says on oath that:

(1) He is the landlord of C. D., his tenant, under a lease whereby he rented an apartment dwelling to C. D. for a term of one year beginning on January 1, 1965, and ending at midnight on December 31, 1965[143] for an agreed rental of $60 per month, payable on or before the first day of each month. Said apartment dwelling is described as apartment number 104-B on the ground floor of a building known as the "A. B. Apartment House," located at 2400 Main Street, Oxford, Lafayette County, Mississippi, and being the apartment occupied by said tenant.[144]

(2) The tenant has defaulted in the payment of the agreed rent[145] of $60 per month by failing to pay said rent for the months of March, April, and May 1965, and is therefore indebted to the landlord in the amount of $180 for arrears of rent.

(3) An amount sufficient to pay the rent owed cannot be obtained by distress of the tenant's goods.[146]

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[142]See MISS. CODE ANN. § 947 (1956).

[143]Note 139 *supra.*

[144]Note 140 *supra.*

[145]See MISS. CODE ANN. § 948 (1956).

[146]*Ibid.*

(4) Written notice has been given to the tenant as required by law.[147]

_____
A. B.

Subscribed and sworn to before me this _____ day of _____, 19____.
(seal)

_____
E. F., Justice of the Peace

3. *Hearing, Judgment, and Appeal*

The judicial officer who receives the affidavit issues a summons commanding the sheriff or other officer to require the tenant to surrender possession of the premises or defend the action. The cause is set for hearing not less than three nor more than five days from the issuance of the summons.[148] A counter affidavit may be filed by the tenant[149] but no provision is made for further pleading. The statutory form of judgment for the landlord is that he be put in possession and recover his costs,[150] but, as previously noted,[151] a money judgment may also be rendered for the rent. An appeal may be made to the circuit court in the same manner as "cases of unlawful entry and detainer."[152] The procedure for such reviews has already been discussed. However, the unusual situation regarding appeal procedure when the unlawful entry and detainer action originates in a county court[153] should be carefully examined, since a county court judge may also preside over a proceeding under section 948.

C. Action When Tenant Deserts

1. *Nature of the Action*

The legislature has provided the landlord with a third summary action which, while not strictly an eviction, does enable him to resume possession of the land under judicial authorization. In order to obtain this relief, the landlord must show that the tenant has deserted the premises leaving arrears of rent which cannot be satisfied by distress of the tenant's property, if any, left on the land.[154]

2. *Procedure and Appeal*

The action is begun by setting out the essential facts in an affidavit

147 *Ibid.*
148 Miss. Code Ann. § 950 (1956).
149 Miss. Code Ann. § 953 (1956).
150 Miss. Code Ann. § 955 (1956).
151 Note 130 *supra.*
152 Miss. Code Ann. § 958 (1956).
153 See notes 99-101 *supra* and accompanyiog text.
154 Miss. Code Ann. § 959 (1956).

before a justice of the peace. The tenant's desertion is then verified by the justice of the peace by a personal examination of the premises. When this examination is made, a notice is left on the premises stating when the justice will return for a second view. A second view of the premises must be made not less than five nor more than fifteen days after the first. If, when the second examination is made, the tenant does not pay the rent owed and it cannot be realized by distress, the justice of the peace may restore the landlord to possession of the premises and declare the tenant's lease void. The tenant has thirty days to appeal to the circuit court and his appeal bond secures only the payment of costs, not the arrears of rent. Even on appeal the cause proceeds in a summary fashion. In case of affirmance the landlord merely retains his possession of the land.[155]

D. Summary and Conclusions

The statutes provide the landlord with three actions by which he may regain possession of the leased premises. Two of these, unlawful entry and detainer and statutory eviction under section 948, are dual in nature. Through either of them the landlord can recover arrears of rent and possession of his land. Only the third action, which lies when the premises have been deserted, is purely possessory in nature. Since it may be brought only when the tenant has deserted, leaving insufficient property for distress, its very nature precludes the collection of rent.

A realistic analysis of the possessory actions compels the conclusion that they are unnecessarily complex and often inadequate. The special unlawful entry and detainer court is supposed to be conducted by three justices of the peace, but the statutes provide that the decision of one justice will control under some circumstances. There seems to be no reason why the inquiry should not be determined by a single justice of the peace in all cases. An alternative forum for unlawful entry and detainer is available in districts which have a county court. However, instead of providing merely a choice of courts, this election also affects the substance of the action. The form of the action in either court is controlled by substantially identical statutes, but the appeal procedure is determined by different statutes. As a result, the procedure for appealing from the county court is incompatible with the rights of the aggrieved party under the unlawful entry and detainer statutes.

Unlawful entry and detainer lies only where the tenant continues in possession after his term expires. Although arrears of rent may be recovered as an incident, the action will not lie where the tenant merely defaults in the payment of rent.

The eviction proceeding under section 948 duplicates the landlord's remedy under unlawful entry and detainer, but it also gives him relief

[155] *Ibid.*

where the tenant defaults in the payment of rent. However, this second basis for the action is so limited as to be of little practical use. So long as the tenant keeps goods on the leased premises which, if distrained, would satisfy the rent claim, he has a good defense to the landlord's suit under the second part of section 948, even though he makes no effort to pay the rent. It is submitted that the value of goods, if sold at public outcry, is too speculative a basis for a complete defense to the landlord's suit. A tenant's allegation that his goods are worth more than the arrears of rent may be reasonable, but the proceeds of a forced sale may be only a fraction of the property's "reasonable" value.

Both unlawful entry and detainer and eviction under section 948 are heard by special courts. The extent of these courts' jurisdiction, particularly in regard to money judgments for rent, is not adequately defined. Since the recovery of a judgment for unpaid rent is an important part of both actions, there is a clear need for a definition of the special courts' powers to grant such relief.

It appears that there is a present need for revision of the possessory actions. Such a revision should produce a single action which would allow recovery of a money judgment and eviction of the tenant. The landlord should be expressly allowed to bring the action whenever the tenancy is terminated pursuant to a lease provision as well as when the tenant holds over beyond the date originally specified as the end of the term. The cause should accrue whenever the tenant defaults in the payment of any sums owed to the landlord under the lease. If the tenant has covenanted to reimburse the landlord for repairs to the premises made necessary by the tenant's acts, then such sums should be recoverable in the same manner as rent and should also form a basis for eviction if not paid. The fact that the landlord may have a remedy by way of distraint should not bar his suit to recover possession of the property or a judgment for money owed. The action should be summary in fashion and jurisdiction should be vested in a special court presided over by either a justice of the peace or county court judge. The court's powers should be clearly defined and independent of the other powers of its presiding officer. Its power to grant money judgments should not be limited to that of a justice of the peace court even if a justice of the peace is its presiding officer. The right to appeal from the special court to a circuit court should be retained, and the procedure for doing so should not be dependent upon whether the officer who presides over the court is a justice of the peace or a county court judge. Such an appeal should operate as a supersedeas, and the special court should be barred from enforcing its judgment before the time for appeal has expired. An aggrieved party should be allowed five days from judgment to perfect an appeal by filing a sufficient bond.

V. Actions To Recover Rent

The landlord's ability to recover rent is not limited to the money judgments recoverable as incidents of a possessory action. He may sue for the rent as for any other debt.[156] Where there is no lease contract or where the lease is not in writing, the landlord may recover the reasonable value of the land's use.[157] In addition to these actions, which if successful result in a money judgment against the tenant, the landlord may obtain satisfaction of the rent by a special type of attachment known as distress.[158]

A. Distress for Rent

1. *Nature and Requisites*

Distress, or distraint as it is also called, is the seizure of a tenant's chattels pursuant to a warrant authorizing such action. The landlord can then recover his rent by having the goods sold.

In Mississippi the remedy of distraint is broad in scope. The landlord may have his tenant's goods distrained if there is rent in arrears,[159] if the tenant has failed to repay advances made to him by the landlord,[160] or if the landlord has "just cause to suspect" that the tenant will remove so much of his property from the premises that the landlord's claim could not be realized out of the remaining property.[161] The action also lies if the landlord has good reason to believe that the tenant will remove the agricultural products on which the landlord has a lien[162] before the end of the term or before the landlord's claim becomes due.[163] The provisions allowing distraint before actual default seem to be designed to insure that the tenant's goods remain on the premises, as a type of security, throughout the term. However, the intended removal must be one which would render the landlord unable to satisfy his claim out of the remaining property.[164] The right to distrain is not the equivalent of a lien upon the tenant's property and will not affect a bona fide sale of such property made prior to distress.[165] But the tenant may not defeat the landlord's right of distraint by merely removing his effects from the premises. The property may be distrained wherever found within thirty days after removal[166] or within thirty days after the rent

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156Miss. Code Ann. § 900 (1956).
157Miss. Code Ann. § 899 (1956).
158Miss. Code Ann. § 910 (1956).
159*Ibid.*
160*Ibid.*
161Miss. Code Ann. § 920 (1956).
162Miss. Code Ann. § 908 (1956).
163Miss. Code Ann. § 920 (1956).
164Stamps v. Gilman & Co., 43 Miss. 456, 466 (1870).
165White v. Miazza-Woods Constr. Co., 122 Miss. 213, 84 So. 181 (1920).
166Miss. Code Ann. § 922 (1956).

or other claim becomes due.[167] Distress may be made as late as six months after the termination of the lease, so long as the landlord retains his interest in the property and the tenant remains in possession of the premises.[168]

2. *Procedure*

Distraint is not a judicial proceeding.[169] If the landlord complies with the statute by making a proper complaint and submitting a bond for double the amount claimed,[170] he has done all that is necessary to obtain a distress warrant authorizing the seizure of the tenant's effects.[171] The distress warrant directs the sheriff or officer to seize enough of the tenant's "goods and chattels" to satisfy the claim. It may also be used to attach the agricultural products grown on the land.[172] When the distress is made, the officer serves notice on the tenant and also advertises the property for sale. If the tenant fails to challenge the distress by counter-affidavit or replevin within three months, the goods are sold at public auction.[173]

The tenant may recover his property by replevin. When such a replevin is made, the tenant must enter into a bond, with sureties approved by the officer making the distress, before he may recover possession of the property.[174] Two types of bonds may be employed for this purpose. The first is conditioned upon the tenant paying the landlord's claim and costs within three months from the date of distraint,[175] or at the time the claim becomes due.[176] The bond is made payable to the landlord in a penal amount twice as large as the claim.[177] This bond is delivered to the landlord.[178] If the tenant defaults by failing to pay the amount claimed within the specified time, the landlord may collect the bond's penalty from the tenant and his sureties.[179]

The second type of bond[180] is not conditioned upon the tenant paying the amount claimed. Instead, the bond guarantees that the tenant will litigate the landlord's right to the property and perform the court's judgment if he fails. The bond's penalty is double the amount claimed

[167] Miss. Code Ann. § 921 (1956).
[168] Miss. Code Ann. § 923 (1956).
[169] Barlow v. Serio, 129 Miss. 432, 91 So. 573 (1922).
[170] Miss. Code Ann. § 911 (1956).
[171] Miss. Code Ann. § 913 (1956).
[172] Miss. Code Ann. § 916 (1956).
[173] Miss. Code Ann. §§ 917, 924 (1956).
[174] Miss. Code Ann. § 917 (1956).
[175] *Ibid.*
[176] Miss. Code Ann. § 920 (1956).
[177] Miss. Code Ann. § 917 (1956).
[178] Miss. Code Ann. § 919 (1956).
[179] *Ibid.*
[180] Miss. Code Ann. § 927 (1956).

or double the value of the property, whichever is less. The sureties on this bond must be approved by the officer in whose custody the property is held. The bond and a statement of the proceedings are delivered to the court which has jurisdiction over the replevin suit. The suit is then heard at the first term of court.[181]

If the officer making the distress mistakenly seizes property which does not belong to the tenant, the real owner may recover it immediately by making an affidavit of ownership and executing a bond such as that required for the tenant.[182] The owner may also file an affidavit without bond and recover the property as though he were a tenant suing in replevin.[183] An ordinary replevin may also be brought by the owner of the distrained property; he is not limited to a tenant's remedy.[184]

Where the amount in controversy exceeds $200, the replevin suit will be heard by the circuit court of the county. If the amount is less than $200, the action will be tried by the justice of the peace who issued the attachment.[185] If judgment is rendered against the tenant or other claimant, he may not bring a second replevin.[186] Where the judgment is against the landlord, the plaintiff may retain the property replevied and recover damages from the landlord. It appears that attorney's fees can be recovered as a part of the claimant's damages.[187] In certain cases the owner of the property can recover double the value of the property distrained. However, double damages can be recovered only where the distraint was obtained by a false assertion that rent or advances were due and the property actually sold.[188] Where the landlord distrains on the grounds that the tenant will remove his effects before the rent or advance is due, he cannot become liable for double damages because he has not claimed that any amount is then due.[189]

B. Summary and Conclusions

The actions to recover rent seem to be generally adequate. Distress provides a fast, inexpensive means of securing the payment of rent. On its face it would almost appear to be too summary to allow the tenant a fair opportunity to defend himself. However, by requiring the landlord to enter into a bond for double the amount claimed, giving the tenant the right to recover the goods by replevin and making the landlord liable

[181] *Ibid.*

[182] Miss. Code Ann. § 942 (1956).

[183] *Ibid.*

[184] Shuler v. L. Grunewald Co., 113 Miss. 763, 74 So. 659 (1917).

[185] Miss. Code Ann. § 927 (1956).

[186] Miss. Code Ann. § 936 (1956).

[187] Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933). *But see* Thornton v. Gardner, 134 Miss. 485, 99 So. 131 (1924).

[188] Miss. Code Ann. § 940 (1956).

[189] Kyzer v. Middleton, 61 Miss. 360 (1883).

for double damages when his conduct becomes oppressive, a fair balance seems to have been achieved.

In one instance the remedy might well be expanded. The proceeding is available only to obtain the payment of rent and advances. While the amounts paid to, or expended for,[190] farm tenants as advances may be recovered by distress, the urban landlord enjoys no such remedy in regard to sums he pays on behalf of apartment tenants. If the lease specifies that the debt is to be a part of the rent and collectible as such, the general rule appears to be that the landlord can recover such collateral debts as though they were rent.[191] However, it is not clear whether this rule is in full force in Mississippi. In an early case our court declined to allow a landlord to distrain to collect an antecedent debt which his tenant had promised to pay *as a part of the rent*, even though the payment of the debt appeared to be part of the lease's consideration.[192] It seems likely that this holding applies only to covenants to pay antecedent debts. In another Mississippi case a landlord was allowed to proceed as though the tenant's covenant to pay taxes on the land constituted rent, although there was no provision to that effect.[193] It is submitted that, to resolve this question, section 910 should be amended to allow the landlord to distrain whenever there is default in any amount required to be paid as consideration for the lease.[194]

One other deficiency is apparent in the action. This is the three month waiting period between seizure of the goods and sale. It appears that this lengthy delay does little except increase the expense of storing the goods pending sale. Since these charges must be deducted from the proceeds of the sale, it is the tenant who actually bears the burden of the delay. As the cost of the action rises, the landlord must make the distress proportionately larger in order to realize the full amount of his claim. In light of this effect, it seems that a thirty day interim between seizure and sale would be preferable.

VI. Security Devices

A. Liens

1. *Agricultural Products*

In Mississippi the landlord has a lien upon all agricultural products raised on the leased premises.[195] This lien secures the payment of both rent and advances. As the Mississippi landlord's primary security de-

[190]See Moak v. Moak, 150 Miss. 289, 116 So. 286 (1928).

[191]*E.g.*, Knepper v. Rothbaum, 104 Misc. 554, 172 N.Y. Supp. 109 (Sup. Ct. App. T. 1918); Korn v. Johnson, 117 S.W.2d 844 (Tex. Civ. App. 1938).

[192]Paxton v. Kennedy, 70 Miss. 865, 12 So. 546 (1893).

[193]See J. W. Roberts & Co. v. Sims, 64 Miss. 597, 2 So. 72 (1887).

[194]See *In re* Copping's Estate, 29 F.2d 998 (S.D. Tex. 1929).

[195]Miss. Code Ann. § 908 (1956).

vice, it has been the subject of much litigation and interpretation. The mass of law which has built up around the crop lien would make it the proper subject of an entire treatise. However, it seems sufficient for the purpose of this article to note that the crop lien encumbers only agricultural products raised on the leased premises and thus is of no importance for either the lessor or lessee of a residential apartment.

2. *Live Stock and Equipment*

The landlord also has a lien, of one year's duration, on all live stock and farming implements which he furnishes to his tenant.[196] This lien secures the landlord's recovery of the reasonable value of the items so furnished. The tenant's crop is also encumbered by this debt. This security, like the crop lien, has no value in the hands of an apartment house landlord.

B. Rights Against Parties Levying on Tenant's Property

A third security device provides the landlord with a limited preference over his tenant's other creditors.[197] Although the landlord has no lien on his tenant's goods, he may require that the rent on the land be paid before those goods are levied upon by the tenant's creditors.[198] Under this provision, the attaching creditor must tender to the landlord all the unpaid rent on the lands before removing any of the tenant's property. The rent must be paid even if it has not become due. However, the payment is limited to one year's rent. The creditor may then recover the amount paid, as well as his original claim, from the proceeds of the levy.[199]

As a practical matter, it seems likely that the chief benefit derived by the landlord from this statute is not the actual collection of rent from his tenant's creditors. A tenant whose financial position is so weak that his judgment creditors are seeking attachments will probably have very little property out of which the claims may be satisfied. Under these circumstances few creditors would be willing to pay the tenant's rent in order to proceed with a levy that might well be unproductive. For this reason, the landlord's preference would undoubtably discourage others from levying on the tenant's goods. The result is that the property remains on the premises and available for distraint by the landlord.

C. Summary and Conclusions

In Mississippi the landlord's chief security device is the crop lien. A lien is also given him on the livestock and farm equipment furnished

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[196]Miss. Code Ann. § 909 (1956).

[197]Miss. Code Ann. § 897 (1956).

[198]See Williams v. Noble, 55 F.2d 658 (5th Cir. 1932).

[199]Miss. Code Ann. § 897 (1956).

to his tenant. These devices, while providing ample protection for the agrarian lessor, are wholly inappropriate for apartment house leasing. The statutes do not give the landlord a lien on his tenant's goods and chattels. The typical farm tenant's personal property is of slight value compared to the crop he produces and the machinery which must be supplied to him if he is to work the land. In most instances a lien on the sharecropper's effects would provide his landlord with scant security.

By contrast the lessor of multi-family housing has no tangible security other than his tenant's personal wealth. Although the apartment tenant's personal fortune may not be great, it represents the only fund out of which the landlord may recover defaulted sums. It is submitted that the statutes should be expanded so as to give the lessor a lien upon his tenant's goods and chattels to secure the payment of rent or any other amounts owed to the landlord by virtue of the lease contract.

Because this lien would cover a wide variety of articles, many of which could easily be pledged as security for loans, a system for notifying the public of the lien would seem to be desirable. Such notice might be given by filing a copy of the lease with a specified public officer. It should not be necessary to list all the tenant's property in the lease. However, the lease register should set out the tenant's name, the address of the leased premises, the beginning and end of his term, the amount of the rent, and its time of payment. The landlord should be barred from enforcing his lien on the tenant's goods against third parties after the end of the term, unless he promptly files an additional notice indicating that his claim against the tenant was unpaid at the end of the term. This additional notice should extend the landlord's lien for not more than three months following the term's expiration.

VIII. The Lease Contract

A. Reasons for Reducing to Writing

There are compelling reasons, in addition to the Statute of Frauds, for always reducing apartment leases to writing. As with any other contract, there is a need for certainty as to the terms of the agreement. The apartment tenant's lease is a matter of daily concern to him since it directly affects his right to use his residence. The tenant who moves into an apartment with only a brief dialog as the basis of his tenancy will often find himself burdened with rules formulated by the landlord as the occasion requires. If the tenant denies that the landlord may so regulate his actions, or if any other dispute arises as to the terms of their parol agreement, the parties are practically forced to settle their differences by litigation. It is rare that suits of this type produce any

real benefit for either party. While no amount of careful drafting can produce a lease which will cover every possible dispute, negotiation will be encouraged by the fact that the parties to a written lease can refer to the exact words which embody their agreement.

The apartment house landlord can ill afford parol leases. If he enters into hundreds of oral leases, he is faced with the prospect of hundreds of lawsuits. Obviously, the practice of requiring tenants to execute a written lease is essential to the successful operation of an apartment house. Since the landlord deals simultaneously with many tenants, it is also essential that the leases contain identical provisions. If this is not done, some tenants may be entitled to use their apartments in a manner which is not allowed for other tenants. The discord resulting from this lack of uniformity makes standardized management procedure impossible and is not commensurate with sound business practices.

B. Form and Covenants

It was noted at the outset of this article that the forms included herein are not intended as sample instruments. They should never be employed until a careful analysis of the particular circumstances surrounding each case has been made.

The following is a basic form of apartment lease. Explanatory material will be found under the corresponding section and paragraph designations in the text immediately following this form.

STATE OF MISSISSIPPI
COUNTY OF _____

LEASE CONTRACT

A. In consideration of the covenants herein set out, _____, LANDLORD, leases to _____, TENANT, the premises described as apartment number _____ on the _____ floor of the building known as _____ located at _____ (street and no.), _____ (city), _____ County, Mississippi, together with the appurtenances thereto, for the term commencing on the _____ day of _____, 19____, and ending at midnight on the _____ day of _____, 19____, unless sooner terminated as hereinafter provided, at the rent of _____ dollars ($_____) per month.

B. The parties hereto covenant as follows:

(1) The tenant shall pay the rent stated in advance on or before the first day of each month without any deductions whatsoever at _____

or such other place as the landlord may designate.

(2) The tenant shall pay all other sums accruing to the landlord by virtue of any provision in this lease within ten days after demand for same. All such sums shall constitute additional rent for the premises and may be sued for and collected by the landlord in the same manner as any other part of the rent.

(3) The landlord may, at his option, credit any sums received from the tenant against the additional rent accruing under section (B) (2) of this lease before applying any part of the amounts received against the rent provided for in section (A) of this lease.

(4) The tenant has examined the premise and is satisfied with the condition thereof and his taking possession shall be conclusive evidence of his receipt of the premises in good repair, except as otherwise provided herein.

(5) The premises shall be used and occupied only by the tenant and members of his immediate family as a private dwelling and for no other purpose.

(6) The premises shall not be used for any illegal activity, nor for any purpose deemed hazardous by the companies carrying insurance thereon. The tenant shall not use the premises for any purpose which will annoy the other tenants or residents of the neighborhood.

(7) The tenant agrees to keep the premises in a clean and orderly condition and to place no boxes, papers, bottles, or rubbish of any sort, or any other items of a hazardous or unsightly nature on the porches, balconies, or walkways, or on any other part of the grounds.

(8) The tenant will permit the landlord or his agents to post "For Rent" or "For Sale" signs on or about the premises, exhibit the premises to prospective purchasers or tenants, and enter the premises for the purpose of making inspections and repairs.

(9) The tenant shall not assign or otherwise transfer his interest under this lease nor shall he sub-let any part of the premises.

(10) The landlord covenants that the tenant, on performing the covenants contained in this lease, may peaceably and quietly have, hold, and enjoy the leased premises during the term of this lease.

(11) If the premises are rendered untenantable by fire or other casualty, the landlord may, at his option, repair the premises within 30 days or terminate this lease by notice to the tenant of his election. If the premises are totally destroyed, this lease shall terminate as of the date of such destruction.

(12) At the termination of this lease, by lapse of time or otherwise, the tenant shall return the keys to the apartment and peacefully surrender and deliver up possession of the premises to the landlord in as good

condition as when received, reasonable wear and tear excepted.

(13) The tenant agrees that any breach of the covenants in this lease committed by persons occupying the premises with him, or by any guests, visitors, or licensees who come onto the premises at the instance of the tenant, or by persons occupying the premises with him shall be considered as breach by the tenant.

(14) If any damage to the property of the landlord shall be caused by the tenant's acts or neglect, the tenant shall immediately repair such damage at his own expense and, should the tenant fail or refuse to make such repairs within 30 days after the damage occurs, the landlord may, at his option, make such repairs, and the tenant shall reimburse the landlord for the total cost thereof. The tenant's obligation to perform this covenant shall survive the expiration or termination of this lease.

(15) The tenant agrees to make no addition, alteration, or improvement, including painting, to the premises without the prior written permission of the landlord. All additions, alterations, and improvements shall be the property of the landlord, and the tenant shall not be entitled to compensation therefor nor shall the tenant remove them from the premises.

(16) If the tenant makes any addition, alternation, or improvement, including painting, to the premises without the written permission of the landlord, the landlord may, at his option, require the tenant to restore the premises to their former condition. If the tenant fails or refuses to make such restoration within 30 days after being notified that he is required to do so, the landlord may restore the premises and the tenant shall reimburse him for the total cost thereof.

(17) Should the tenant at any time during the term of this lease remove his effects from the premises, or if a petition in bankruptcy be filed by or against the tenant, then the whole rent for the entire remaining term of this lease shall at once become due and payable, and the landlord may proceed by distraint or otherwise to collect said rent as if, by the provisions of this lease, the rent for the entire term were due and payable in advance; or the landlord may, at his option, terminate this lease and re-enter the premises.

(18) If the tenant fails to perform any of the covenants of this lease, on his part to be performed, or vacates the premises during the term of this lease without having paid the rent for the entire term, the landlord may, at his option, terminate this lease and re-enter the premises; however, such re-entry shall not work a forfeiture of rents or relieve the tenant of his obligation

to perform all the covenants of this lease during the entire term thereof. If the landlord re-lets the premises, the tenant shall nevertheless continue to be bound by the covenants of this lease and shall pay to the landlord any deficiency between the amount obtained by re-letting and the rent herein reserved.

(19) If the landlord incurs any expense, including reasonable attorney's fees, in instituting, prosecuting, or defending any action or proceeding instituted by reason of the tenant's breach of any covenant contained in this lease, or the tenant's abandonment of the premises, or the tenant's wrongful or negligent use of the premises or grounds, the tenant shall, upon demand, reimburse the landlord for all such expenses.

(20) Any notice or demand required to be given to the tenant by the provisions of this lease shall be in writing and shall be sufficiently given if sent to the tenant by registered mail addressed to him at the leased premises or at such other address as the tenant may designate by written notice to the landlord.

(21) The failure of the landlord to insist upon the strict performance of the covenants contained in this lease shall not constitute nor be construed as a waiver or relinquishment of the landlord's right thereafter to enforce any such covenants.

(22) This lease, together with any riders attached hereto, constitutes the entire agreement between the parties and neither party is bound by any representations or agreements of any kind except as herein contained.

(23) All covenants in this lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, and successors of the parties hereto.

C. In witness whereof the landlord and tenant have executed this lease in duplicate on the day and year indicated.

TENANT

_____ Signed _____, 19____
_____ Signed _____, 19____
_____ Signed _____, 19____

LANDLORD

_____

By_____ Signed _____, 19____
Title_____

D. State of Mississippi

ACKNOWLEDGEMENT

County of _____

Personally appeared before me, the undersigned authority in and for the jurisdiction above mentioned _____ _____ who as _____ of _____ _____ corporation acknowledged that upon authority duly and legally given him, he signed and delivered the

foregoing instrument on the day and date therein named for the intent and purpose therein expressed.

Witness my signature and seal of office this the _____ day of _____, 19____.

_____

E. GUARANTY

In consideration of the making of the foregoing lease by the landlord therein named, the undersigned guarantees to the landlord the full performance by the tenant therein named of all the covenants and agreements on the part of the tenant contained in said lease. The undersigned agrees that this guaranty shall remain and continue in full force and effect as to any renewal, modification, or extension of this lease.

_____ Signed _____, 19____

Every person engaged in drafting instruments develops preferences as to style of wording and organization. The phraseology and arrangements employed in the foregoing lease is in no way submitted as being representative of a "prevailing" or "generally accepted" form of drafting.

The following text is keyed to the corresponding parts of the lease.

Section A. This portion of the lease is sufficient in itself to establish the relationship of landlord and tenant. It sets out the names of the parties, length of the term, amount of rent to be paid, and a description of the premises.[200] The provision for the description of the premises appears to be adequate to satisfy the Statute of Frauds.[201]

Another form, arranged in a somewhat different fashion, will be more familiar to many.

THIS INDENTURE made and executed by and between _____, hereinafter referred to as the Landlord, and _____ _____, hereinafter referred to as the Tenant,

WITNESSETH: That the Landlord, in consideration of the rents herein reserved and the covenants herein contained, does hereby demise, lease, and let to the Tenant, and the Tenant does hereby hire and lease from the Landlord, the premises described as follows, to-wit: apartment number _____ on the _____ floor of that certain building known as _____ and located at _____, _____, _____ County, Mississippi, for the term of _____ commencing on the _____ day of _____, A.D., 19____, and ending on the _____ day of _____,

[200]See LESAR, LANDLORD AND TENANT § 3.19, at 216-17 (1957).

[201]See Galvin v. Dunitz, 229 Mich. 419, 201 N.W. 452 (1924). See generally Jones v. Hickson, 204 Miss. 373, 37 So. 2d 625 (1948).

A.D., 19____, unless sooner terminated as hereinafter provided, at a monthly rental of $_____.

It appears that both forms accomplish essentially the same things.

Section B(1). A covenant to pay rent is standard for apartment leases, as is the requirement that the tenant pay the monthly rent in advance.

Section B(2). A covenant of this nature should be included in every Mississippi apartment lease and, as a matter of practice, is usually included in leases made in all jurisdictions. The clause is designed to allow the landlord to avail himself of the usual landlord's actions to collect all amounts owed under the lease. In Mississippi the statutes creating the landlord's remedies relate to "rent" rather than sums arising generally out of the lease contract.[202] As previously noted, the statutes also provide relief where the amount owed is for advances made by the landlord, but this additional provision is usually of no worth to the apartment lessor.

The value of a clause of this sort is apparent in situations where the tenant refuses to pay the cost of repairing damage he has caused to the apartment. Without this provision, the landlord would be able to proceed against the tenant only as in other cases of debts arising out of contract. If successful, he would recover a judgment against the tenant. However, if an "additional rent" clause is included in the lease, the landlord may proceed with the more effective remedy of distress. Also, he may maintain an action under section 948 to remove the tenant, even though the ordinary rent has been paid.

It should be remembered that in some instances collateral amounts, which the lease requires the tenant to pay, will not be considered as rent even though the lease expressly provides for such treatment.[203] It appears, however, that such cases are an exception to the widely recognized rule allowing debts arising out of the tenancy to be regarded as rent if the lease so provides.[204]

Section B(3). A provision of this sort should accompany the "additional rent" clause discussed in the preceeding section. Whenever the tenant has become obligated to pay the landlord for repairs or other charges, any amounts tendered to the landlord should be applied toward payment of these collateral debts before crediting anything against the ordinary rent. Since some collateral charges may not be collectable as "additional rent," despite a provision to that effect, it is to the landlord's advantage to obtain payment of such items before allowing the tenant to discharge his obligation to pay ordinary rent.

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[202]See Miss. Code Ann. §§ 897, 910, 920, 948, 959 (1956).

[203]Paxton v. Kennedy, 70 Miss. 865, 12 So. 546 (1893).

[204]Notes 191, 193 *supra* and accompanying text.

Section B(4). This clause, which is found in most leases, is included to prevent the tenant from escaping liability for damage to the premises by claiming that the damage existed at the time he began occupancy.

Section B(5). This is a standard clause for leases of dwellings of any sort.

Section B(6). Many leases neglect to include the hazardous use provision contained in this covenant. However, situations may arise where a tenant's use of his apartment, although not constituting a nuisance, will result in an increase in insurance premiums for the entire building. For this reason a "hazardous use" clause should be included.

Section B(7). This is one of many clauses which may be inserted in the lease to prohibit undesirable conduct. Often such restrictions are incorporated in the lease by reference to a separate list of specific "rules and regulations" which the tenant agrees to observe. No general formula can be devised for the drafting of such provisions since they are designed for specific situations. The following are examples of such items.

"All garbage and refuse must be sent down to the basement in such manner and at such times as the superintendent may direct."

"No animals of any kind shall be allowed on the premises except by written permission of the landlord. In no event shall any dog be permitted in the hallways or on any passenger elevator or on the grounds about the building unless carried or on leash."

"The air intake filters on the air conditioners furnished for the apartment shall be cleaned not less than every two weeks during periods when the air conditioners are operated."

Section B(8). This is a typical provision regarding the landlord's rights to go onto the premises. It is of a type similar to the provisions described in the preceeding section, and a number of clauses of this sort will be found in most leases. The following is another commonly used clause of this category.

"The landlord may retain a passkey to the premises and the tenant shall not alter any lock or install a new lock on any door of the premises."

Section B(9). In the absence of an express covenant to the contrary, the tenant is free to assign his lease or sub-let the premises.[205] As previously noted, such actions may produce undesirable consequences for the landlord. It seems best either to prohibit the tenant from assigning or sub-leasing, or to require that he obtain the landlord's approval before doing so. Where assignment or sub-leasing is allowed, the landlord should require the assignee or subtenant to agree to be bound by all the covenants in the lease.

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[205]Notes 55-56 *supra* and accompanying text.

Section B(10). A covenant of quiet enjoyment will be assumed even in the absence of this standard clause.[206]

Section B(11). The possibility that the premises may be destroyed or damaged by fire or other casualty makes a covenant of this sort requisite to any complete lease. By statute the tenant is not required to continue paying rent after the premises are destroyed, without fault on his part, unless he has covenanted to do so.[207] If the premises are only partly destroyed, the tenant is entitled to a proportionate abatement in rent.[208] The amount of time given the landlord to make his election to repair or terminate the lease usually varies from thirty to ninety days. In determining the period to be used, attention should be given to the insurance coverage on the premises and the length of time required for adjustment of claims. Subject to this consideration, the election period should be as brief as possible.

Section B(12). This provision is common to most apartment leases. The requirement that the tenant deliver up the premises in as good condition as when received does not obligate him to repair or rebuild the premises if they are destroyed by fire or other casualty unless he has expressly covenanted to do so, or the damage was caused by his fault.[209]

Section B(13). This is one of many forms used to hold the tenant liable for acts committed by members of his household or his guests. Although such liability can usually be imposed under an agency concept, a provision to this effect will be found in most leases.

Section B(14). In commercial leases the tenant's duty to repair usually extends to all work necessary to maintain the premises. Apartment leases ordinarily require the tenant to repair only damage caused by his fault. This clause should always contain a provision allowing the landlord to make the repairs and charge the tenant for his expenses. This is one of the items which becomes a part of the "additional rent" provided for in section B(2) of the lease.

Glass breakage is one of the items of damage which often occurs in apartments. Some leases provide that the landlord will repair any broken windows and that the cost of the repairs will be divided equally between landlord and tenant unless the damage was intentionally caused by the tenant.

Section B(15). This clause is directed toward maintaining the property in the same general condition throughout the term. Although this provision recites the landlord's common law right to retain improvements,[210] it seems best to require that the tenant obtain the landlord's

[206]See 1 TIFFANY, LANDLORD AND TENANT § 79, at 517-19 (1912).

[207]MISS. CODE ANN. § 898 (1956).

[208]Taylor v. Hart, 73 Miss. 22, 18 So. 546 (1895).

[209]MISS. CODE ANN. § 898 (1956).

[210]See BENNETT, LANDLORD AND TENANT § 113, at 178-79 (1939).

consent before altering the premises. This is particularly true where the tenant contemplates redecorating the apartment, since his tastes may be such that the apartment will have to be restored to its former condition before it can be leased to another tenant. In the absence of a lease for several years, the landlord should reserve the right to prevent alterations of the premises. Some leases go even further in this regard and include detailed restrictions in the rules and regulations which are made a part of the lease.

"No spikes, screws, or nails shall be driven or otherwise inserted into the walls or woodwork of the premises."

"No awnings or window guards shall be attached to the walls of the building, and no blinds, shades, or screens shall be attached in any manner to any window or door of the leased premises without the written permission of the landlord or his agents."

Section B(16). This provision relates to the covenant against alteration of the premises by the tenant. If the landlord is forced to make the restoration himself, the cost thereof will become a part of the "additional rent" under section B(2).

Section B(17). If the tenant removes his effects from the premises, the landlord may seize them by distress.[211] This clause accelerates the rent in such cases so that the landlord may claim the amount reserved for the full term when he makes the distraint. The provisions of this section also relate to the landlord's right to prove a claim for damages against the tenant's estate under the bankruptcy laws.[212] There has been much discussion and controversy about the landlord's rights against a bankrupt tenant,[213] and a full examination of this area is beyond the scope of this comment. But it should be noted that the Mississippi statute giving the landlord the right to collect rent before his tenant's goods are removed from the premises, under attachment or other proceeding,[214] does not give him a lien on the tenant's effects. It has been held that this statute grants the landlord the status of a priority creditor in regard to accrued rent.[215] There it was said that "complete justice is ordinarily done when the landlord is granted priority for accrued rent, and the demised premises are released to him for the unexpired portion of the term."[216]

Draftsmen often include a very detailed provision regarding bankruptcy or assignments for the benefit of creditors. An example of such a clause is found in the lease form adopted by the Real Estate Board of

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[211] MISS. CODE ANN. § 921 (1956).

[212] 11 U.S.C. § 103 (1956).

[213] See generally NADLER, BANKRUPTCY §§ 222, 247-48 (2d ed. 1965).

[214] MISS. CODE ANN. § 897 (1956).

[215] *In re* Wall, 60 F.2d 573 (S.D. Miss. 1932).

[216] *Id.* at 578.

New York, Inc.[217]

Section B(18). This clause gives the landlord a highly effective remedy in cases where the tenant refuses to abide by the terms of his lease. The basis of the remedy is the landlord's right to terminate the lease for any default by the tenant. Once the tenant's right to continue in possession has been terminated, the landlord may avail himself of the possessory actions which are designed to apply only to tenant's who hold over beyond the date specified as the end of the term.[218] Termination of the lease would ordinarily relieve the tenant of his liability for continued performance.[219] However, if the lease so provides, the tenant may be required to continue paying rent and performing his other covenants even after he has been evicted.[220]

This clause confers similar benefits on the landlord in cases where the tenant deserts the premises. It replaces the statutory remedy which is often unsatisfactory, because it renders the lease void, releasing the tenant from further liability.[221]

Section B(19). This provision is primarily directed toward allowing the landlord to recover his attorney's fees if he litigates any controversy with the tenant. However, it also provides in general terms that the landlord can recover from the tenant any expense he incurs in litigation arising from the tenant's abuse of the tenancy.

In at least one case the landlord cannot avail himself of this clause. Where the landlord sues the tenant for double rent,[222] he is precluded from also claiming damages in the form of attorney's fees, even though such a recovery is allowed under the lease.[223] It has been held that the double rent statute provides "an exclusive remedy as the measure of damages for holding over after notice to vacate."[224]

Section B(20). It is usually desirable to include a provision as to the method of giving any notice, or making any demand, called for by the lease. Although the method to be employed is largely within the drafter's discretion, the use of registered mail is generally favored since it gives the notifying party a written record of having served the notice. Some leases merely contain a clause whereby the tenant waives all notices and demands. Since, as a practical matter, notice or demand will usually

[217]This form is reprinted in BELSHEIM, MODERN LEGAL FORMS § 5095.2, at 205-06 (1962).

[218]See MISS. CODE ANN. §§ 948, 1033, 1049 (1956).

[219]See Adams v. Graham Stave & Heading Co., 160 Miss. 266, 135 So. 198 (1931).

[220]See, *e.g.*, Raleigh Realty Corp. v. Jacobs, 127 N.J.L. 454, 23 A.2d 280 (Sup. Ct. 1941).

[221]MISS. CODE ANN. § 959 (1956).

[222]See MISS. CODE ANN. § 947 (1956).

[223]Hines Motor Co. v. Hederman, 201 Miss. 859, 30 So. 2d 70 (1947).

[224]Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

preceed any positive action, it seems best to provide an agreed means of service.

Section B(21). This clause is standard.

Section B(22). This section often includes a stipulation that the landlord has made no promise to repair or decorate the premises.

Section B(23). This clause recites the common law attributes of covenants running with the land. It becomes important when there is a change in the parties to the tenancy, as by death of the tenant or assignment of the lease.

Section C. This form provides space for execution of the lease by an agent of the landlord. In this respect it should be noted that an agent can make a valid lease for more than one year only if he has *written* authority to do so.[225] It will also be noted that no space is provided for a corporate seal since private corporations are no longer required to convey lands under seal.[226] It may be convenient to allow space for witnesses' signatures in this part of the form.

Section D. If the lease is to comply with the recording act, it should be acknowledged and filed.[227] The form shown here is intended for a corporate acknowledgement.[228]

Section E. It is often desirable to have a guarantor for leases written for minors or others who are not financially independent. There are numerous forms for such a guaranty. However, the Statute of Frauds requires that they be in writing.[229]

An examination of the sample lease and foregoing discussion will confirm, as previously noted, that this form is basic in nature. It will often have to be expanded to adapt to particular situations. Among the items which may require specific additions are: apartment furnishings; utilities, particularly when furnished by the landlord; and security deposits. Where assignments and sub-leases are allowed, additional provisions may also be desired.

In drafting such clauses it may be helpful to refer to some of the form books and drafting manuals which are generally available. However, a careful analysis should always preceed the adoption of any part of a printed form.

> No matter how many times the attorney has read the particular piece of 'boiler plate,' he must, nevertheless, test its application to the transaction in question.[230]
>
> *Michael B. Taylor*

[225]Lobdell v. Mason, 71 Miss. 937, 15 So. 44 (1894); Miss. Code Ann. § 264 (1956).

[226]Miss. Code Ann. § 841 (1956).

[227]Miss. Code Ann. § 868 (1956).

[228]For other forms see Miss. Code Ann. § 858 (1956).

[229]Miss. Code Ann. § 264 (1956).

[230]Kuder, *Comments on the Use of Printed Lease Forms,* Case & Com., May-June 1966, p. 12.

REFERENCES IN THE CIRCUIT COURTS OF MISSISSIPPI

I. Introductory

The following discussion is an examination of the statute and case law applicable to references in the circuit courts of Mississippi. The subject is developed from both the substantive and procedural viewpoints and includes the Mississippi law applicable to the determination by a court appointed referee of a cause pending in the circuit courts.

The comment will not deal directly with references in equity, but significant differences in the circuit and chancery practice in this area will be noted throughout the text. Also excluded from extensive consideration is the submission of controversies to arbitration.

Viewed in the light of the state's rapidly expanding judicial system and crowded circuit court dockets in many of the urban areas, circuit court references could prove extremely helpful to the Mississippi practitioner. It is the purpose of the comment to inform the Mississippi bar of these statutes and of their potential importance to every Mississippi lawyer.

Four sections of the Mississippi Code[1] are devoted to the subject of references and only four cases[2] have arisen under them. Because of the limited number of Mississippi cases dealing with references, the comment will mention cases and statutes outside of this jurisdiction in an effort to give the reader a complete and comprehensive treatment of the subject.

II. History

The early English courts, without statutory authority, appointed auditors in a limited class of cases to hear and determine matters involving complicated matters of account.[3] These were the first known courts to engage in such a practice.[4] With the exception of the action of account, the common law did not recognize the reference of a pending action for trial before a referee.[5] However, compulsory references to masters in chancery have long been made in equity actions.[6] This practice arose in the 19th century when the one-judge chancery courts were laboring under a tremendous work load. To alleviate the problem, formal and detailed business was delegated to subordinant officers under the supervision of the chancellor.[7]

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[1] Miss. Code Ann. §§ 1540-43 (1956).

[2] Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936); Fewell v. American Sur. Co., 80 Miss. 782, 28 So. 755 (1900); Marlar v. State, 62 Miss. 677 (1885); Anding v. Levy, 60 Miss. 487 (1882).

[3] Fenno v. Primrose, 119 Fed. 801, 805 (1st Cir. 1903).

[4] *Ibid.*

[5] Steck v. Colorado Fuel & Iron Co., 142 N.Y. 236, 37 N.E. 1 (1894).

[6] 45 Am. Jur. *References* § 2 (1943).

[7] Plucknett, A Concise History of the Common Law 209 (5th ed. 1956).

In the United States the reference of pending cases was coeval with the formation of our judicial system.[8] The state of New York began the practice of referring matters of account when it was still a Dutch Colony.[9] In 1683, after the Dutch capitulated to the English, all trials in New York were held before a twelve man jury.[10] Jury trials in all cases soon proved unworkable and the colony of New York passed a statute authorizing the reference of any common law action.[11] In many of the other colonies prior to the revolution, long accounts were referred to an arbitrator or referee, this being a common mode of trial during that time.[12] It is interesting to note that the reference of an account "was one of the most difficult, dilatory, and expensive actions known to the law, and was very rarely resorted to."[13]

A history of references in Mississippi is non-existent. The statutes first appeared in the Code of 1857 and have undergone no appreciable change in one hundred and ten years. The statutes have been included in all seven of the codes adopted by our state since 1857. To the writer's knowledge, there is no legislative history of these code sections and this is the first article ever written on the subject in our state.

III. Definitions and Distinctions

A *reference* is the transfer of a pending case or a particular question in a case to an individual who hears and determines the case or question referred to him, or takes evidence on the matter and reports his findings to the court.[14] In Mississippi the subject is divisible into two major classes—first, references by consent of the parties,[15] and second, compulsory references,[16] which are ordered by the court of its own motion or on the motion of one of the litigants. A reference is a useful judicial tool and may be used to relieve the court's work load, thereby expediting business.[17]

The *referee* is a person appointed by the court to perform certain duties in a pending cause of action. In certain instances the referee hears and decides the entire cause in much the same way a judge would do in a regular trial.[18] Courts have an inherent power to seek outside

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[8]Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1864).
[9]Decker v. Canzoneri, 256 App. Div. 68, 9 N.Y.S.2d 210 (1939).
[10]*Ibid.*
[11]*Ibid.*
[12]45 Am. Jur. *References* § 2 (1943).
[13]Steck v. Colorado Fuel & Iron Co., 142 N.Y. 236, 37 N.E. 1 (1894).
[14]State *ex rel.* Wright v. McQuillin, 252 Mo. 334, 158 S.W. 652 (1913).
[15]Miss. Code Ann. § 1540 (1956).
[16]Miss. Code Ann. § 1541 (1956).
[17]45 Am. Jur. *References* § 1 (1943).
[18]State *ex rel.* Wright v. McQuillin, 252 Mo. 334, 158 S.W. 653 (1913).

assistance by referring appropriate matters to private individuals.[19] The referee sits in place of the judge, exercises judicial power and authority,[20] and performs all duties normally executed by a judge.[21] He is an officer of the court and is commonly regarded as a judge *ad hoc*.[22] The referee is guided by the law and rules that would have controlled the judge . . .",[23] however, a referee is not bound by prior rulings of the court and has the power to change or alter those prior rulings.[24] His control of the case continues until it is closed and a valid judgment is entered.[25] A circuit judge is not qualified to serve as a referee in a case pending in his court.[26]

References are to be distinguished from arbitration in that the latter is a voluntary submission by the parties of a disputed matter to persons chosen by them. The decision of these persons or arbitrators is substituted for the judgment of a regular court.[27] A common law arbitration is not a judicial proceeding, but is contractual. If the decision of the arbitrators is not followed, a cause of action accrues in favor of the party abiding by the decision of the arbitrators.[28] As pointed out above, a reference is a judicial proceeding and is always made in a cause *pending* before the circuit court.

The Mississippi Legislature has provided potential litigants with a means of settling their differences out of court by way of arbitration:

> All persons, except infants and persons of unsound mind, may, by instrument of writing, submit to the decision of one or more arbitrators *any controversy* which may be existing between them, *which might be the subject of an action*, and may, in such submission, agree that the court having jurisdiction of the subject-matter shall render judgment on the award made pursuant to such submission. In such case, however, should the parties agree upon a court without jurisdiction of the subject-matters of the award, the judgment shall be rendered by the court having jurisdiction in the county of the residence of the party, or some one of them, against whom the award shall be made.[29]

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[19]Shipman v. Straitsville Cent. Mining Co., 158 U.S. 356, 361 (1895).

[20]Jones v. Jones, 188 Mo. App. 220, 175 S.W. 227, 230 (1915).

[21]Young v. Worrell, 91 Fla. 856, 108 So. 887 (1926).

[22]Franklin Phosphate Co. v. International Harvester Co., 62 Fla. 185, 57 So. 206 (1912).

[23]Young v. Worrell, 91 Fla. 856, 108 So. 887 (1926).

[24]Franklin Phosphate Co. v. International Harvester Co., 62 Fla. 185, 57 So. 206 (1912).

[25]Young v. Worrell, 91 Fla. 856, 108 So. 887 (1926).

[26]Woodin v. Phoenix, 41 Mich. 655, 2 N.W. 923 (1879).

[27]Turner v. Stewart, 51 W. Va. 493, 41 S.E. 924 (1902).

[28]Fidelity & Deposit Co. v. Woltz, 234 App. Div. 823, 253 N.Y. Supp. 583 (1931).

[29]Miss. Code Ann. § 279 (1956). (Emphasis added.)

The circuit court referee has a counterpart in the chancery court known as a master in chancery.[30] Chancery courts have long had the power and discretion to appoint masters to aid the court in proper matters.[31] In Mississippi two or more persons may be appointed in each county to serve as masters or commissioners in chancery,[32] and these persons have decidedly more power than circuit court referees.[33] Masters have the power to administer oaths, take depositions from witnesses, execute decrees, and have "all the power properly belonging to masters . . . in chancery according to the practice of equity courts as heretofore exercised."[34] Section 1366 of the Code was recently amended to give masters even broader powers than they had under the old statute. In counties with a population of over 115,000 and an assessed valuation of over $60,000,000, the chancellor can refer certain cases to the master. The master will conduct an original hearing in the matter, either in term time or vacation, and make a written report to the chancellor, who will approve, disapprove, or modify the findings of the master and enter the proper decree.[35]

IV. Reference by Consent of the Parties

The first Mississippi statute dealing with references provides for a reference by the consent of the parties:

> *All the issues* in an action, *whether of fact or law,* may be referred to one or more referees, not exceeding three, upon the consent of the parties.[36]

Since only one case, *Anding v. Levy*,[37] has arisen under this statute, it is necessary to set it forth in detail to show a complete development of references by consent.

While their case was pending in the circuit court of Lincoln County, Anding and Levy consented to have the case referred to three referees under what is now section 1540 of the Code. The report does not show whether the motion for reference was made orally or by written motion. The three referees heard the case and an award was returned in favor of the plaintiff. At the request of the defendant a bill of exceptions was returned to the court along with their award. The bill excepted to certain testimony taken by the referees and this testimony was not returned to the court as a part of the referees' award.

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[30]See Griffith, Mississippi Chancery Practice §§ 598-604 (2d ed. 1950).
[31]*Id.* § 598.
[32]Miss. Code Ann. § 1365 (1956).
[33]See Miss. Code Ann. § 1366 (Supp. 1964).
[34]Miss. Code Ann. § 1366 (Supp. 1964).
[35]*Ibid.*
[36]Miss. Code Ann. § 1540 (1956). (Emphasis added.)
[37]60 Miss. 487 (1882).

The question in the case was whether the evidence received in the hearing before the referees should have been returned to the court along with the award, so that the circuit judge could review the findings of the referees and the evidence presented before them. The defendant filed a motion in the circuit court requesting that the referees be compelled to return the evidence received by them as a part of their report. The motion was overruled and judgment was entered upon the award. Appellant contended that this was error.

The Mississippi Supreme Court held that it had no power to review the referees' findings either of law or fact and that the award returned by the referees was final and conclusive. The court said that section 1540 contained no provision for a review by the court of the referees' findings:

> The referees appointed by the consent of both parties are the judges both of the law and the facts, and constitute a *quasi*-court, whose judgments are not subject to review by any other tribunal. In cases of fraud, the award might be attacked. . . .[38]

Since all jurisdictions do not follow the Mississippi rule as set out above, the following general discussion is offered to develop fully the subject of references by consent.

Any party to a civil action has the right to select the manner in which his cause of action will be tried.[39] As early as 1878 the United States Supreme Court held that the power of courts to refer pending cases, when the parties consent to the reference, was an incident of judicial administration. Such an agreement is not contrary to law or public policy. When parties submit a cause for reference, it is implied that they intend to abide by the referee's findings and that these findings will be final and conclusive.[40] However, it should be noted that one case has held that parties acting in a fiduciary capacity should not submit their causes to a referee.[41]

Opposing parties in a civil suit have several alternatives as to the method by which their case will be tried. They may have a trial by jury, they may waive trial by jury and have the judge hear and determine the case, they may submit to arbitration, or they may agree to a reference.[42]

The request or motion for a reference by consent may be made orally or by written motion, depending on the practice in the particular

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[38]*Id.* at 490.

[39]Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).

[40]Newcomb v. Wood, 97 U.S. 581 (1878).

[41]See Campbell v. Fayette County, 127 Pa. 86, 17 Atl. 882 (1889).

[42]Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).

jurisdiction.[43] Once the parties consent to a reference, their consent can only be revoked by the subsequent agreement of both parties to the suit.[44]

The order of reference having been made by a court of competent jurisdiction, the order is not voided merely because it becomes necessary to bring in additional parties.[45] Along the same line, the parties to a reference cannot consent to a reference of a certain matter and later attempt to have the referee decide unrelated matters which are in dispute between the consenting parties.[46]

The cases do not specifically mention any standard procedure to be followed to obtain a reference.[47] However it would seem that after issue has been joined by the pleadings filed in court, the parties may then consent to a reference and file a motion requesting such. After the motion is made and granted, the order of reference is entered upon the minutes and the time for the hearing is set.[48] In contrast to the circuit practice of referring only pending causes, a matter may be referred to a master in chancery at any stage of the suit.[49]

When parties submit to a reference by consent, the general rule is that they are bound by the award rendered by the referee.[50] Mississippi apparently follows this rule.[51] The modern view seems to be that when the referee's award is presented to the judge, he may accept it or recommit it to the referee for further findings or opinions.[52] The judge may also amend or modify the award or he may make additional findings of fact and enter judgment on the award as thus amended.[53] Where exceptions are not taken to the findings of the referee in a consent reference, the findings will be conclusive, and not subject to review by the circuit court.[54]

Neither the Mississippi Code nor the cases give any indication as to the procedure to be followed in obtaining a consent reference. Under section 1540 a reference may be had only when a case is pending before the circuit court.[55] This appears to mean that the plaintiff must

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[43]45 AM. JUR. *References* § 4 (1943).
[44]Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).
[45]Beall v. Weston, 83 S.C. 491, 65 S.E. 823 (1909).
[46]Ford v. Town of Whitefield, 137 Me. 125, 15 A.2d 857 (1940).
[47]45 AM. JUR. *References* § 15 (1943).
[48]*Ibid.*
[49]*Ibid.*
[50]Bradford v. Davis, 143 Me. 124, 56 A.2d 68 (1947).
[51]See Anding v. Levy, 60 Miss. 487 (1882).
[52]Bradford v. Davis, 143 Me. 124, 56 A.2d 68 (1947).
[53]Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).
[54]*Ibid.*
[55]See Anding v. Levy, 60 Miss. 487 (1882).

have filed his declaration, the defendant answered, and the case set on the docket. When the case is called for trial, the parties should then make their motion for reference. At that time the circuit judge will have before him the pleadings in the case and should be able to determine from a reading of the pleadings and by questioning the parties if a justiciable issue is present. The motion for reference may be made orally by having it read into the record, or it may be in writing. The following is a suggested form for such a motion:

Motion for Reference by Consent

IN THE CIRCUIT COURT OF _____ COUNTY,
MISSISSIPPI

_____, Plaintiff

V. No._____

_____, Defendant

Comes now the Plaintiff, _____, and the Defendant, _____, and move the court to refer the above numbered cause to a referee/referees as provided by Miss. Code Ann. § 1540 (1956). It is hereby agreed and stipulated by the above named parties that the referee/referees appointed by this court shall hear and determine all issues of fact and law in said cause and shall return their award to this court, whereupon judgment will be entered in accordance with said award.

_____
Attorney for Plaintiff

_____
Attorney for Defendant

If the circuit judge believes the issue in the case to be one that can be fairly determined by a referee, then he should enter an order appointing the referees and setting forth their duties and responsibilities. After consulting with the parties, a date for the hearing should be set, and when the hearing is completed, the award of the referees will be returned to the judge. To expedite matters, this award could possibly be returned to the judge in vacation to save the parties the delay of waiting until the next term of court to have the award approved. Usually, all that the judge will need to do is to sign the award so as to make it a valid judgment.

Under the present Mississippi rule[56] consent references are a rather sterile proceeding, and it is understandable that this procedure has seen little use in the state in past years. However, the practical significance of the procedure appears to warrant further consideration.

[56] *Ibid.*

It is submitted that the *Levy*[57] holding would not be followed by the present Mississippi Supreme Court and that the parties to a reference by consent could easily protect themselves from the *Levy* result by adding the following language to their motion for a consent reference:

> The parties further agree and stipulate that upon the request of either party the circuit judge shall review the record of the referees and make such additions or corrections to the award as the judge shall deem proper from the evidence contained in the record of reference.

Such a statement in the motion should be adequate to protect the parties and would provide them with a procedural safeguard.

V. Compulsory References

A. Statute Authorizing Compulsory References

Actions in which a compulsory reference may be ordered are usually prescribed by statute. These statutes generally confine compulsory references to cases involving matters of account.[58] Mississippi's statute is one of these:

> In *all cases in which matters of account are in controversy,* the court may, on the application of either party, direct a reference to one or more competent persons, not exceeding three, as referees, to state and report an account between the parties, and the amount that may be due from either party to the other, which report, when confirmed by the court, shall be final and conclusive between the parties, and judgment shall be entered thereon; but *either party may, at the time of ordering the reference, enter his dissent therefrom, and, during the term to which the report is filed, may demand a trial by jury,* in which case the cause shall be so tried, the costs of the reference to abide the result; and upon such trial the report of the referees shall be *prima facie* evidence of all the matters therein found and reported; and *at the time of demanding the trial by jury, the party shall file his exceptions to the report,* and matters not excepted to shall be treated as true on the trial. Either party may move for a new trial, take bills of exceptions, and have an appeal, as in other cases.[59]

B. Issues Referable

"Compulsory references in actions at law are the exception rather than the rule,"[60] and the compulsory reference of a proper matter is within the sound discretion of the court.[61]

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[57] *Ibid.*

[58] 45 Am. Jur. *References* § 8 (1943).

[59] Miss. Code Ann. § 1541 (1956). (Emphasis added.)

[60] 45 Am. Jur. *References* § 5 (1943).

[61] *Ex parte* Peterson, 253 U.S. 300, 314 (1920).

The right of trial by jury in actions at law is superior to the right of reference unless the matter referred is not specifically authorized by statute.[62] Where a court refers a cause not authorized by statute, the constitutional rights of the litigants are infringed.[63] The Mississippi court has held that where a compulsory reference is ordered under section 1541, the right of trial by jury, when requested, will be carefully preserved.[64]

When parties consent to the appointment of a referee, in a case where the statute provides for a compulsory reference only, the reference will be treated as compulsory.[65] Mississippi follows the rule that the statutory enumeration of cases in which a compulsory reference may be ordered is exclusive.[66] The statute expressly states that an action is not one proper for a compulsory reference unless "matters of account are in controversy. . . ."[67] Therefore, in this state, the *only issue* which may be referred without the consent of both parties to the suit is an action which comprises a matter of account.

The fact that an action entails the examination of an account must appear on the face of the pleadings, or the court will not have the power to refer the cause.[68] The pleadings must also show the necessity for the examination of the account.[69]

C. Accounts

For an account to be present, there must be dealings and transactions between the parties[70] involving charges and credits.[71] The matter concerning the account must be the central issue in the case,[72] and the need for an incidental examination of an account is not enough to bring the case within the statute.[73]

The Mississippi court has held that a suit on a tax collector's bond was a case involving matters of account.[74] In a case not dealing directly with references, the court inferred that the determination of amounts

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[62]45 Am. Jur. *References* § 5 (1943).

[63]Hasty v. Pierpont, 146 Kan. 517, 72 P.2d 69 (1937).

[64]Marlar v. State, 62 Miss. 677 (1885).

[65]City of St. Louis v. Parker-Washington Co., 271 Mo. 229, 196 S.W. 767 (1917).

[66]See Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936).

[67]Miss. Code Ann. § 1541 (1956).

[68]See Kagey v. West Coast Theaters Corp., 139 Kan. 301, 31 P.2d 67 (1934).

[69]*Ibid.*

[70]Andrus v. Home Ins. Co., 73 Wis. 642, 41 N.W. 956 (1889).

[71]Pierson v. Minnehaha County, 28 S.D. 534, 134 N.W. 212 (1912).

[72]Andrus v. Home Ins. Co., 73 Wis. 642, 41 N.W. 956 (1889).

[73]*Ibid.*

[74]Marlar v. State, 62 Miss. 677 (1885).

due creditors under the terms of a building contract would be a proper matter for reference under our statute.[75]

Perhaps the most enlightening discussion in Mississippi on the matter was given in the case of *Gilmore-Puckett Lumber Co. v. The Bank of Tupelo.*[76] This case dealt with an action for trespass and conversion which had been referred to a referee on the motion of the plaintiff. On appeal the defendant contended that this was not a proper matter for referral under section 1541 of the Code. The supreme court stated the general rule to be that references in law courts can only be made in cases arising in contract and are not available in actions in tort.[77] Conversion is a tort action and therefore this case was not capable of reference.[78]

D. Suggested Procedure for Obtaining Compulsory References

To obtain a compulsory reference, one must follow a substantially different procedure from that followed in consent references. Under section 1541 the motion for a compulsory reference *must* be made by one of the parties litigant. In the case of *Fewell v. American Surety Co.*[79] the Mississippi court stated that "if the accounts are intricate, *the court may direct* a trial by referees. . . ."[80] In making this statement the court read something into the statute that is not there. Our statute reads that a reference may be ordered "on the application of *either party*. . . ."[81] However, it is submitted that a proper function of the court is to suggest a reference where one is needed and this was done in the *Bank of Tupelo* case.

The motion may be oral or written, and set out below is a suggested form for such a motion:

Motion for Compulsory Reference

IN THE CIRCUIT COURT OF _____ COUNTY,
MISSISSIPPI

_____, Plaintiff

V. No. _____

_____, Defendant

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[75]Fewell v. American Sur. Co., 80 Miss. 782, 28 So. 755 (1900).
[76]177 Miss. 152, 170 So. 682 (1936).
[77]*Ibid.*
[78]*Ibid.*
[79]80 Miss. 782, 28 So. 755 (1900).
[80]*Id.* at 795, 28 So. at 758. (Emphasis added.)
[81]Miss. Code Ann. § 1541 (1956). (Emphasis added.)

Comes now the Plaintiff/Defendant, _____, and moves that the above numbered cause, in which matters of account are in controversy, be referred to a referee/referees who shall hear the evidence and return to this court a report of his findings concerning said matters of account and upon the return of the report judgment shall be entered in accordance with it.

_____
Attorney

At the time the motion is made, the court may determine from the pleadings filed in the cause if matters of account are actually in controversy. If such matters are contained in the case, the court should enter its order appointing the referee and setting forth his functions and duties. If the motion is granted, the non-consenting party *must* at that time *enter his objection to the reference.* The case of *Marlar v. State*[82] held that a party waives his right to a jury trial by failing to voice his dissent at the time the reference is ordered.

The hearing before the referee should be conducted in the same manner as if the case were being tried before judge and jury. By appearing before the referee and defending his position, the non-consenting party does not waive his objection to the reference.[83] After the hearing the referee should notify the parties that his report is complete and the report should thereafter be filed in the circuit court. It is essential that the parties be notified of the filing so that they may read the report and have ample time to file objections to it.

When the report is filed, the non-consenting party may make his motion for a trial by jury, provided that he objected when the order of reference was entered.[84] In the *Marlar* case the court held it error to confirm the referee's report and to deny the non-consenting party a trial by jury when his objection was made a matter of record at the time the reference was ordered, and when he demanded a trial by jury at the time the report was filed.[85]

It is important to note that the circuit court also has power to vacate an order of reference when an improper matter has been referred.[86]

If the party did not object to the reference, his only recourse is to file exceptions to the report and the court will hear and determine these objections. If the exceptions are of merit, the court may set

[82]62 Miss. 677 (1885).

[83]Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936).

[84]Marlar v. State, 62 Miss. 677 (1885).

[85]*Ibid.*

[86]Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936).

aside the report and remand the matter for further findings, or it may order another reference. The court derives this power from section 1542 of the Code:

> Either party, without having demanded trial by jury [at the time the reference is ordered], may file exceptions to the report of the referees; and the court shall hear and determine the same, and may set aside the report and direct another reference to the same or other referees. Bills of exceptions may be taken, and, after final judgment, an appeal may be prosecuted as in other cases.[87]

VI. The Referee

A. Eligibility

The referee must be a disinterested person, unless the parties designate an interested party to serve. Some jurisdictions require the referee to be an attorney,[88] while others permit the reference of a case to a private person.[89]

Mississippi's statute does not set forth any qualifications for a referee; therefore, it is assumed that he may be any person recommended by the parties or selected by the court. The referee in the *Bank of Tupelo* case was a practicing attorney.[90] It is submitted that the appointment of a private party as a referee should only be made under exceptional circumstances. Since a reference is a *quasi*-judicial proceeding,[91] an attorney-referee is better qualified to protect the rights of the parties at the hearing. A private party, such as a certified public accountant, could possibly be appointed where the issues in the case were such as to require his special knowledge and skill.

B. Powers and Duties

> Referees shall have power to administer oaths, and to issue subpoenas for witnesses, and to compel their attendance, in cases referred to them.[92]

The court must enter an order appointing the referee.[93] This order will determine the scope of the referee's authority and should set forth his functions and duties.[94] A referee who is given full power to hear, try, and determine a case will have all the powers the circuit judge would have had, had he heard the matter.[95] It is generally held that a referee has the power to hold a witness in contempt for refusal to

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[87]Miss. Code Ann. § 1542 (1956).

[88]76 C.J.S. *References* § 62 (1952).

[89]*E.g.*, Shipman v. Straitsville Cent. Mining Co., 158 U.S. 356 (1895).

[90]Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936).

[91]Anding v. Levy, 60 Miss. 487 (1882).

[92]Miss. Code Ann. § 1542 (1956).

answer proper questions.[96] In the *Bank of Tupelo* case the referee was given the power to hire a stenographer, summon witnesses, and take proof.[97] It is submitted that the order of reference should detail each function of the referee and what authority he is to have. Under this procedure errors will be held to a minimum by the referee not exceeding his authority.

C. Removal

A referee should not be removed except for a substantial reason, such as bias or prejudice, and an alleged error in a ruling which he has made is not a sufficient cause to justify removal.[98]

D. Compensation

The compensation to be allowed a referee is within the discretion of the court.[99] A referee's compensation should be adequate to the work done, time employed, and responsibility assumed.[100] His remuneration should be liberal, but not exorbitant, and the salaries of other judicial officials should serve as a guideline.[101] The Mississippi rule is that a referee is entitled to a reasonable compensation.[102] The referee's pay, stenographer's fees, and other similar expenses will usually be taxed as costs against the losing party.[103]

VII. Report and Findings

A. Report

The report should take the following form: (1) The referee should state his findings of fact in numbered paragraphs; (2) he should state his conclusions of law, which should likewise be in numbered paragraphs; and (3) the referee should set forth his award.[104] The referee's reports should be returned to the court at the time set forth in the order of reference. If the order sets forth no time, the report should be returned to the term of court immediately following the term at which the reference was ordered.[105] The reports should be concise and brief;

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[93]76 C.J.S. *References* § 64 (1952).

[94]45 Am. Jur. *References* § 22 (1943).

[95]*Ibid.*

[96]See Annot., 8 A.L.R. 1543, 1576 (1920).

[97]Gilmore-Puckett Lumber Co. v. Bank of Tupelo, 177 Miss. 152, 170 So. 682 (1936).

[98]Shine v. Fitzgerald, 14 N.Y.S.2d 169 (Sup. Ct. Spec. T. 1939).

[99]Newton v. Consolidated Gas Co., 259 U.S. 101 (1922).

[100]*Ibid.*

[101]*Ibid.*

[102]Barton v. Parker, 57 Miss. 144 (1879).

[103]45 Am. Jur. *References* § 20 (1943).

[104]See Roberts v. Benjamin, 124 U.S. 64 (1888).

[105]76 C.J.S. *References* § 113 (1952).

facts of law should be stated without repetition, and arguments of counsel should be excluded.[106] The referee's report will be liberally construed,[107] but it must be consistent and the facts must support the conclusions of law reached.[108]

Personal comments or observations of the referee on the case have no proper place in the report.[109] The report should not incorporate any conclusions of counsel as to what was shown by the evidence when such conclusions were repudiated by the referee at the hearing.[110] It should not contain questions as to the admissibility of evidence, because it is the referee's duty to make definite rulings at the time the objections are made.[111]

B. Findings of Fact and Conclusions of Law

No general rule can be laid down as to the conclusiveness of the report since so much depends on the nature of the reference and the terms of the order.[112] In the absence of mistakes of law, fraud, partiality, prejudice, or other misconduct, the report of a referee in a general reference to hear and determine the entire action is ordinarily conclusive.[113]

A referee has no power to make findings except on the evidence admitted at the hearing.[114] Where the evidence is produced before the referee and heard by him, the general rule is that his findings on a question of fact are entitled to the same weight in an appellate court as a special jury verdict.[115] When the evidence presented at the hearing is not included in the referee's report, his findings are conclusive.[116]

Where there is no testimony supporting a referee's findings of fact, such findings are not conclusive; but where his findings are based on conflicting testimony, or credibility of witnesses, his findings are unassailable.[117] The above statement necessarily assumes that the testimony taken before the referee is returned to the court. Generally the findings of a referee which are approved by the court are entitled to the same weight as a jury verdict.[118]

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[106] 45 AM. JUR. *References* § 29 (1943).
[107] 76 C.J.S. *References* § 121 (1952).
[108] *Id.* § 129.
[109] 45 AM. JUR. *References* § 29 (1943).
[110] State v. Adams Express Co., 85 Neb. 25, 122 N.W. 691 (1909).
[111] Gantt v. Brown, 238 Mo. 560, 142 S.W. 422 (1911).
[112] 76 C.J.S. *References* § 141 (1952).
[113] *Ibid.*
[114] *In re* McNamee, 131 Cal. App. 30, 20 P.2d 722 (Dist. Ct. App. 1933).
[115] *E.g.*, Davis v. Schwartz, 155 U.S. 631 (1895).
[116] Roberts v. Benjamin, 124 U.S. 64 (1888).
[117] Davis v. Schwartz, 155 U.S. 631 (1895).
[118] 3 AM. JUR. *Appeal & Error* § 913 (1936).

C. Objections and Exceptions

This topic has been partially treated in the foregoing sections entitled "Suggested Procedure" and the following are general comments applicable to both consent and compulsory references.

If counsel thinks that the referee has committed error in admitting evidence, or some other procedural mistake, he must make a timely objection just as he would do before the trial court.[119] Exceptions to the report are usually made for the purpose of taking an appeal from the referee's findings.[120] Such objections must be specific, and the burden of sustaining the charges is on the exceptor.[121]

D. Action of Court on the Report

Until the referee's report is confirmed by the court, it has no judicial basis; but once confirmed, it becomes a valid and enforceable judgment.[122] At common law the court had no power to modify the referee's findings; its only authority was to set aside the report.[123] When the court refused to confirm the report, the cause stood as if it had never been referred, and the cause thereafter proceeded to trial.[124]

In consent references in Mississippi, the circuit court *does not* have the power to review the findings of the referee, and the referee's award is final and conclusive and is not subject to review by any other tribunal except in cases of fraud.[125]

The circuit court has full authority to confirm or reject the report of the referee in a compulsory reference.[126] The Mississippi compulsory reference statute gives the circuit judge the power to order another reference if he believes that an unjust result has been reached in the initial reference.[127] After judgment is entered on the referee's award, the parties may file exceptions to it and appeal to the state supreme court.[128]

VIII. Conclusion

It is submitted that few attorneys are aware of the subject of references and of their potential usefulness to every Mississippi lawyer. The purpose of this comment has been to shed some light on the subject in the hope that in the coming years the Mississippi bar may find them to be of practical significance. *Robert K. Upchurch*

119Clark v. Cox, 134 Conn. 226, 56 A.2d 512 (1947).
120Phillips v. Warren County Bd. of Educ., 265 Ky. 580, 97 S.W.2d 408 (1936).
121*Ibid.*
122Spooner v. Spooner, 234 Iowa 33, 11 N.W.2d 600 (1943).
123Dundee Mortgage Co. v. Hughes, 124 U.S. 157 (1888).
124*Ibid.*
125Anding v. Levy, 60 Miss. 487 (1882).
126Miss. Code Ann. § 1542 (1956).
127*Ibid.*
128*Ibid.*

STUDENT NOTES

Domestic Relations—Wife's Liability for Necessities for Which She Has Contracted

The wife's liability for necessities for which she has contracted is, in most jurisdictions, settled law. Recently, however, the Mississippi Supreme Court overruled existing case law and expanded the wife's liability in this area. The following note is an attempt to analyze this decision as compared to the laws of the remaining jurisdictions and to indicate its probable impact in future litigation in the Mississippi courts.

The decedent wife, during her last illness, was attended by the complainant physicians for approximately fifty days, during which time they rendered the necessary medical services and performed required surgery. The physicians brought claims against the wife's estate for professional services. The chancellor found the probate of the claims timely, the services personally rendered, and the charges reasonable. But he held as a matter of law that the claims were not allowable, on the ground that, in absence of an express agreement on the part of the wife to pay the expenses, the husband is obligated to provide all necessities. The Mississippi Supreme Court reversed and rendered judgment for the physicians, ruling that in the absence of an express agreement, when a married woman obtains necessities under such circumstances that would give rise to an implied contract to pay for the necessities had she not been married, she is liable jointly with her husband for the value of the goods or services received and recovery may be had from her estate. The case of *McLemore v. Riley's Hosp.*[1] was thus overruled. *Cooke v. Adams,* 183 So. 2d 925 (Miss. 1966).

At common law it was the husband's responsibility to supply his wife with necessities suitable to their station in life.[2] This responsibility arose out of the marriage relation and was generally based on the implied agency of the wife.[3] The husband's liability was not affected by the fact that the wife had a separate estate of her own,[4] for at common law the disability of coverture placed the wife's property under the protection of the husband, and the wife was not allowed to make any contract affecting her property without the consent of her husband.[5] With the advent of the married woman's acts emancipating a woman's property from the control of her husband, most jurisdictions recognized the wife's right to contract and thereby bind her property free from any claim or control of her husband.[6] These statutes did not, however, free the husband of his common law responsibility to provide his wife's necessities[7]. Medical services furnished the wife during her last illness are necessities under this common law doctrine, and thus such services

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[1] 197 Miss. 317, 20 So. 2d 67 (1944).

[2] *E.g.,* Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247 (1933).

[3] *Ibid.*

[4] *E.g.,* Reynolds v. Rice, 244 Mo. App. 972, 27 S.W.2d 1059 (1930).

[5] *E.g.,* Osborn v. Horine, 19 Ill. 123 (1857).

[6] *E.g.,* Galtney v. Wood, 149 Miss. 56, 58, 115 So. 117 (1928).

[7] *Ibid.*

are the responsibility of the husband.[8] Although under this rule neither the wife nor her estate is legally liable for necessities, equity courts have frequently allowed such claims against her estate when her husband was poverty-stricken or insolvent.[9]

The overwhelming majority of the states now hold the wife liable for necessities she contracted for or purchased on her own credit.[10] However, the status of the husband's liability under these circumstances is not consistent among these states. One group holds the husband secondarily liable for his wife's necessities when purchased by her on her own credit[11] and thereby retains some vestige of the now obsolete common law disability of coverture. The most prevalent group completely relieves the husband of his common law obligation under these circumstances.[12] At least one jurisdiction now holds the husband and wife jointly liable for necessities purchased by the wife on her own credit.[13]

In all of the jurisdictions holding the wife liable for necessities she contracted for or purchased on her own credit, the wife's liability is based on a contract made by her to pay for the received necessities out of her own property.[14] The term contract has come to embrace many types of agreements. In a discussion of a wife's contractual liabilities, three classifications of contracts are pertinent: the express contract; the implied contract or, as it is sometime called, the contract implied in fact; and the quasi-contract or contract implied in law.

The express contract requires that mutual agreement between the parties be stated either orally or in writing at the time the agreement is reached.[15] This is clearly binding on the wife in all of the above jurisdictions.

The implied contract presents a more difficult problem. It is similiar to the express contract in that it is based on mutual agreement between the parties[16] and carries the same legal effect,[17] but it is different in regard to the mode of proof of existence. As previously stated, in order to prove an express contract, it must be shown that the agreement between the parties was expressed either in writing or orally. A contract implied in fact, however, may be proved if it can be shown either by circumstances or actions on the part of the parties that there existed a mutual intention to contract.[18] While the mode of proof is considerably different from that required by an express contract, it is still regarded as a true contract since it is based on the mutual agreement of the parties involved.[19]

The third type of contract to be considered is a quasi-contract.[20] In

[8]See, *e.g.*, *In re* Huebner's Will, 138 Misc. 101, 244 N.Y. Supp. 764 (1930).
[9]See, *e.g.*, Carpenter v. Hazelrigg, 103 Ky. 538, 45 S.W. 666 (1898).
[10]*E.g.*, *In re* Oppenheim's Estate, 178 Misc. 1026, 37 N.Y.S.2d 43 (1942).
[11]See, *e.g.*, Powell v. Kansas Yellow Cab Co., 156 Kan. 150, 131 P.2d 686 (1942).
[12]*E.g.*, *In re* Oppenheim's Estate, 178 Misc. 1026, 37 N.Y.S.2d 43 (1942).
[13]See Goldberg v. Zellner, 235 S.W. 870 (Tex. 1921).
[14]*E.g.*, *In re* Oppenheim's Estate, 178 Misc. 1026, 37 N.Y.S.2d 43 (1942).
[15]*E.g.*, Southwestern Transp. Co. v. Poye, 194 Ark. 982, 110 S.W.2d 494 (1937).
[16]*E.g.*, Silva v. Providence Hosp., 14 Cal. Rptr. 2d 762, 97 P.2d 798 (1939).
[17]*E.g.*, Maasdam v. Maasdam's Estate, 237 Iowa 877, 24 N.W.2d 316 (1946).
[18]See, *e.g.*, Bailey v. Interstate Airmotive, 358 Mo. 1121, 219 S.W.2d 333 (1949).
[19]*Ibid.*

this type, generally referred to as a contract implied in law, the requirement that there be assent on the part of the parties is completely lacking.[21] The quasi-contract is based on a duty imposed by law without regard to the intentions of the parties[22] in order to bring about justice.[23]

While the courts vary in their descriptions of what action on the part of the wife is necessary to bind her, they all seem to allow contracts implied in fact, as well as expressed contracts.[24] Many of the courts have specifically stated that in addition to an expressed contract circumstances or conduct on the part of the wife might be such as to make her liable for necessities.[25] Others in more succinctly written opinions merely require a "contract" by the wife.[26] The more concise definition of the term "contract" excludes contracts implied in law[27] since they do not require assent of the parties involved. Therefore, only express contracts and contracts implied in fact are included.[28]

If this more concise definition is used and the circumstances or conduct on the part of the wife is such as would give rise to an implied agreement, then all of the above jurisdictions would include contracts implied in fact as binding on the wife. Since, however, none of these decisions specifically mention a contract implied in law, it might be successfully argued that such a contract would not be implied by these courts, even though a person other than a wife might be bound under the same circumstances. The bases for this argument would be, first, that a quasi-contract is not a true contract[29] and therefore would not be binding in the jurisdictions requiring a "contract" on the part of the wife. Second, in the jurisdictions that specify that in addition to express contracts, circumstances or conduct on the part of the wife may make her liable for necessities, the decisions are based on fact situations that give rise to a contract implied in fact and not a contract implied in law. While these decisions do not explicitly exclude contracts implied in law, neither do they include them.[30] Third, the stipulation of many of these courts, that in order for the wife to be liable it must be shown that the necessities were purchased on the wife's credit,[31] would exclude the quasi-contract since there must be some evidence of the wife's agreement for this to be shown.[32]

Many jurisdictions have statutes controlling the payment of just claims against any estate. These statutes usually provide for the payment

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[20] *E.g.*, Bartlett v. Raidart, 107 Conn. 691, 142 Atl. 398 (1928).

[21] *Ibid.*

[22] *E.g.*, Caldwell v. Missouri State Life Ins. Co., 148 Ark. 474, 230 S.W. 566 (1921).

[23] *E.g.*,, Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943).

[24] *E.g.*, Mooney v. McMahon, 83 N.J.L. 120, 83 Atl. 504 (1912).

[25] *Ibid.*

[26] *E.g.*, Powell v. Kansas Yellow Cab Co., 156 Kan. 150, 131 P.2d 686 (1942).

[27] *E.g.*, Bartlett v. Raidart, 107 Conn. 691, 142 Atl. 398 (1928).

[28] *E.g.*, Bailey v. Interstate Airmotive, 358 Mo. 1121, 219 S.W.2d 333 (1949).

[29] *Ibid.*

[30] See, *e.g.*, Mooney v. McMahon, 83 N.J.L. 120, 83 Atl. 504 (1912).

[31] *E.g.*, Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914).

[32] *Ibid.*

of funeral and last illness expenses before other claims on the estate are satisfied.[33] While these jurisdictions have generally held that the wife's estate was primarily liable for funeral expenses even though they constitute necessities under the common law doctrine,[34] almost all of them have held the statute applies to last illness expenses only when the husband is insolvent or when there is a contract by the wife binding her estate.[35] Another group of states have statutes making the husband and wife jointly and severally liable for family necessities supplied to and used by the family.[36] Medical expenses, including those incurred during the wife's last illness, are within the scope of this statute.[37] Under these family expense statutes, it is immaterial which spouse contracted for the necessities or on whose credit the necessities were supplied.[38]

In 1839 the legislature of Mississippi passed a statute permitting married women to own and possess property in their own names.[39] This was the first of the so-called married woman's acts that were eventually to eliminate the common law disability of coverture throughout the United States. Although the historical impact of this statute is not to be denied, the legal impact was quite insignificant. In the earlier cases the Mississippi court recognized that the statute secured to the wife her specific real and personal property.[40] This advance in the woman's struggle for equality was quickly lost when, in an 1846 decision, the court held that the act of 1839 restrained rather than enlarged the wife's power to bind her separate estate.[41] In a case following shortly thereafter the court held the wife's estate was liable for her debts when a distinct intention to bind such property existed.[42] This ruling was based on equity principles,[43] however, and the court did not mention the married woman's act.

This act with its subsequent amendments was eventually recognized as giving the wife with a separate estate the right to contract.[44] Although this right was at first limited to situations specifically allowed by statute,[45] it still represented a significent step toward today's standards. The 1880 enactment of what is now section 451 of the Mississippi Code completed the statutory evolution of the married woman's rights in Mississippi. However, none of the above statutes allow the husband to escape his common law duty to support his wife. It was explicitly stated in several instances that the act of 1839 did not relieve the husband of this duty.[46]

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[33]*E.g.*, Wis. Stat. § 313.16 (1925).

[34]*E.g.*, Moulton v. Smith, 16 R.I. 126, 12 Atl. 891 (1888).

[35]*Ibid.*

[36]*E.g.*, Hansen v. Hayes, 175 Ore. 358, 154 P.2d 202, 205 (1944).

[37]*Ibid.*

[38]*E.g.*, Wall v. Crawford, 103 Colo. 66, 82 P.2d 749 (1938).

[39]Miss. Laws 1839, ch. 46, at 72.

[40]Grand Gulf Bank v. Barnes, 10 Miss. (2 S. & M.) 165, 184 (1844).

[41]Davis v. Foy, 15 Miss. (7 S. & M.) 64 (1846).

[42]Dickson v. Miller, 19 Miss. (11 S. & M.) 594, 603 (1848).

[43]*Id.* at 602.

[44]Dunbar v. Meyer, Deutch & Co., 43 Miss. 679 (1871).

[45]*Ibid.*

[46]Grand Gulf Bank v. Barnes, 10 Miss. (2 S. & M.) 165, 186 (1844).

As early as 1887 the Mississippi Supreme Court recognized that the wife may also be liable for necessities when it can be shown that they were sold to her on her own credit by agreement either expressed or implied.[47] It is interesting to note that the court in this instance expressly included implied agreements as being binding on the wife.[48] In a much later decision, the court stated that a married woman could make any lawful contract.[49] Although implied contracts were not specifically mentioned, it could certainly be included under this broad statement of the court. The court then in 1932, in a suit by a creditor against the husband for necessities furnished the wife on her own credit, held the husband not liable[50] and said that the husband does not become a surety when the wife defaults in the performance of her own contract.[51] Although the court in this case relied on an express contract by the wife, it did not exclude an implied contract as being binding on the wife.[52] Still later in *McLemore v. Riley's Hosp.*[53] the court reaffirmed the wife's liability when necessities were supplied her on her credit. In expressly overruling *McLemore,* the instant case said that *McLemore* required an express agreement on the part of the wife.[54] However, nowhere in the *McLemore* opinion is this explicitly stated. The opinion merely states that the husband is liable for necessities furnished the wife in the absence of a promise or agreement on her part to pay for the same.[55] However, this statement does not conflict with the earlier statement of the court that the agreement could be either expressed or implied.[56]

The primary consideration in the instant case was whether the wife's estate was liable for necessities obtained by her in the absence of any express agreement on her part to pay for these necessities.[57] This question arose as a result of the interpretation of the *McLemore* case in the trial court. The chancellor held that there must be an express agreement on the part of the wife in order to hold her estate liable for the expenses of her last illness.[58] This rule prohibited recovery by the complainants.[59]

The court could have allowed recovery by the complainants by several alternate lines of reasoning. The record showed that the deceased, while in the hospital under the care of the complainant physicians, stated to an attending nurse that she had her own money and medical insurance and wanted to see to her medical expenses. If the court had held that this statement by the deceased constituted an express agreement, it could have accepted the *McLemore* rule and allowed

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[47]Van Diver v. Buckley, 1 So. 633 (Miss. 1887).
[48]*Ibid.*
[49]Galtney v. Wood, 149 Miss. 56, 68, 115 So. 117, 120 (1928).
[50]Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247 (1933).
[51]*Ibid.*
[52]See Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247 (1933).
[53]197 Miss. 317, 20 So. 2d 67 (1944).
[54]Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).
[55]McLemore v. Riley's Hosp., 197 Miss. 317, 20 So. 2d 67 (1944).
[56]Van Diver v. Buckley, 1 So. 633 (Miss. 1887).
[57]Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).
[58]*Ibid.*
[59]*Ibid.*

recovery by the complainants. The court, however, felt that this rule was unrealistic and did violence to the legislative policy of the state.[60]

The court in *Cooke* could have held the lower court's interpretation of the *McLemore* case erroneous since nowhere in that opinion did the court explicitly state such a rule. On the contrary, the case only required that it appear that the necessities were supplied the wife on her own individual credit.[61] This requirement could be satisfied by an implied as well as an express agreement. This approach would have been consistent with earlier Mississippi case law which specifically included implied agreements.[62] The court instead chose to affirm the chancellor's interpretation,[63] thus making it necessary to overrule completely the *McLemore* case. This approach may appear to be extreme as compared to the alternatives. However, it is submitted that in view of the court's expressed desire to advance the rights of the married woman in keeping with the remainder of the nation,[64] the destruction of the *McLemore* rule is more effective in obtaining these desired ends.

The supreme court, with this obstacle removed, went a step further. Not only did it include implied agreements as being binding on the wife,[65] but it also held contracts implied in law as being binding.[66] This quasi-contract does not require any type of agreement on the part of the wife but only that the services or goods be furnished in good faith and for the personal benefit of the wife.[67] With the inclusion of this last type of contract, the court faced still another problem. Under earlier Mississippi case law the husband was not liable for necessities supplied the wife on her credit.[68] The remote possibility of a husband escaping his common law obligation to furnish his wife necessities because of a contract implied in law was eliminated when the court separated the implied contracts from the expressed contracts and imposed joint liability on both the husband and wife under the implied contracts.[69] While this joint liability does not change the obligation of the husband to support his wife and family,[70] it seems that this decision has lessened the burden of the husband's liability since prior to this decision the wife was not liable for necessities under circumstances that would give rise to a contract implied in law.[71] Although the husband is still liable under these circumstances, he now shares the liability with his wife. However, in one respect this joint liability appears to increase his burden since he can no longer completely escape liability if his wife receives necessities as a result of a contract implied in fact. Although no cases have been

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[60] *Ibid.*

[61] McLemore v. Riley's Hosp., 197 Miss. 317, 20 So. 2d 67 (1944).

[62] Van Diver v. Buckley, 1 So. 633 (Miss. 1887).

[63] Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

[68] Skehan v. Davidson Co., 164 Miss. 518, 145 So. 247 (1933).

[69] Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).

[70] *Ibid.*

[71] See Van Diver v. Buckley, 1 So. 633 (Miss. 1887).

found on this specific point, it would seem that prior to this decision a convincing argument could have been presented to support such an increase in liability.

The result of this case is that a wife's contractual freedom in Mississippi is now complete. She is now liable for all goods or services received by her, regardless of the type of contract on which the procurement was based.

The court in this case based its decision on a desire to keep abreast of a nation-wide trend to expand the emancipation of women[72] as well as public[73] and legislative policy[74] as indicated by the Mississippi constitution and statutes. However, it is submitted that Mississippi is now the leader in the expansion of the economic emancipation of women, for in no other jurisdiction retaining the husband's common law obligation to furnish his wife with necessities do the courts allow a contract implied in law to bind the wife personally.

Jason H. Floyd, Jr.

Fraud and Undue Influence—Confidential Relationships and the Presumption of Undue Influence

In every area of law there are various inferences and presumptions which arise from the conduct of persons toward each other. In some instances the presumptions are rebuttable, and in others they are not. Whether statutory or judicial in origin, these presumptions are usually founded in some way upon public policy. As this note will demonstrate, the area of fiduciary relations is no exception. In fact, it probably serves as one of the clearest examples of judicially created presumptions arising from the relationships of persons and their conduct toward each other. This note will point out some of these presumptions and the circumstances from which they arise, examine their various effects, and attempt to formulate some conclusions as to the need for their continued use or modification.

A recent Mississippi case gives but one clear example of the many sets of circumstances which have precipitated the body of rules and presumptions surrounding confidential or fiduciary relationships. In 1951 the deceased executed a will leaving the bulk of his estate to his two sons, who became the plaintiff and the principal defendant. Although the decedent made all the arrangements for the attorney who prepared the will and dictated all of its terms himself, the will, after its execution, was kept by the defendant in his own safe. During the ten years between the execution of the will and the testator's death, the defendant and his son acted as financial advisers to the testator, either personally handling or directing the conduct of most of his affairs. At the time of his death, most of the testator's funds were invested in common stocks. The defendant recommended the stocks which were to be purchased, ordered

[72]Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).
[73]*Ibid.*
[74]*Ibid.*

all of them, and directed the broker to register them jointly in the names of the testator and the defendant. These stocks were also kept in the defendant's safe. The defendant completely handled the transaction to purchase the building for the testator's store, purchasing it in joint ownership also. The testator ate most of his meals with the defendant and his family and lived on the same lot with them in a house provided by the defendant. When the will was probated, the plaintiff intervened and attacked all of the transactions between the defendant and the testator, alleging that their effect was to reduce his inheritance to nothing. The trial court found that a confidential relationship existed between the defendant and the testator; that the defendant had violated this confidence by converting practically all of the testator's estate into joint ownership, thereby effectively disinheriting the plaintiff; and that through all of these transactions the testator never had the benefit of outside, independent advice. On the basis of these and other findings, the chancellor set aside all of the transactions between the defendant and the testator and ordered that a full accounting be made to the plaintiff. Although the supreme court reversed the case and remanded it for a new trial on other grounds, it accepted the chancellor's findings as to the existence of a confidential relationship and his statement of the governing law. *Lipson v. Lipson,* 183 So. 2d 900 (Miss. 1966).

A confidential or fiduciary relationship, such as that found to exist in the instant case, has been defined generally as any relationship existing between two parties wherein there is confidence reposed by one party and accepted by the other with superiority and influence resulting on the part of the confidant.[1] While this definition is vague at best, it has been intentionally left this way by courts of equity to preclude the omission of later cases differing factually from those relied upon for the definition.[2] Because the concept of confidential and fiduciary relationships was created and developed by the English courts of equity, extended attention will be given to the early cases in England. As will be shown, the principal effect of such a relationship, once it was shown to exist, was to cast an aura of doubt and suspicion over all dealings between the parties to that relationship.

In *Osmond v. Fitzroy,*[3] a case of first impression, a father entrusted the care of his minor son to a servant to prevent the boy from being imposed upon by others. The servant induced the son to give him a bond which was secreted from the father. When the son was unable to pay after reaching majority, suit was brought upon the bond by the servant. The father brought a cross-action to have the obligation cancelled. In setting aside the bond, the chancellor explained his action by saying that "a breach of trust is of itself evidence of fraud, nay, of the greatest fraud: because a man, however careful otherwise, is apt to be off his guard when dealing with one in whom he reposes a confidence."[4] Although the chancellor used the three terms—"trust," "fraud," and "confidence"—which have become practically indispensable to opinion writers

[1] See Tate v. Williamson, L.R. 2 Ch. App. 55 (1866).

[2] 3 Pomeroy, Equity Jurisprudence § 956a (5th ed. 1954).

[3] 24 Eng. Rep. 997 (Ch. 1731).

[4] *Id.* at 998.

in discussing these cases, he did not actually refer to a confidential relationship per se. Six years later, the same court refused to set aside a purchase by a guardian of his ward's estate,[5] basing its decision partly on the fact that a full consideration was paid. Another chancellor found the "key terms" to be of little utility in cancelling a gift from a cestui que trust to her guardian-trustee which the cestui made soon after reaching majority.[6] With the absence of fraud or breach of trust, the chancellor had to rely on public policy as a basis for his decision.[7]

Although no common definition was given to the types of relationships with which they were dealing, the courts continued to cancel transactions between parties in formal positions of trust.[8] This early trend was described in *Hatch v. Hatch*,[9] wherein the chancellor said that "it is almost impossible in the course of the connection of guardian and ward, attorney and client, . . . trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty."[10] Despite this trend it was not until 1807, in *Huguenin v. Baseley*,[11] that all the varied bases of recovery were congealed into one generalized formula. In voiding a conveyance by a woman to her minister, the chancellor dealt more definitively with this heretofore rather nebulous relationship by saying that the relief "stands upon a general principle, applying to all the variety of relations, in which dominion may be exercised by one person over another."[12]

Courts of equity soon recognized a special need on the part of minors when dealing with adults. In such transactions, if the minor was not shown to have had the aid of independent legal advice or assistance to enable him to understand his true position, the adult was required to demonstrate the "clearest and most satisfactory evidence of fair dealing with [the minor]"[13] before the adult could benefit from the transaction. Lord Cranworth expressed the general attitude of courts of equity on this subject when he said that there is "no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependance, as it were, upon others, from being imposed upon by those upon whom they are so dependent."[14] Within the purview of this general attitude, conveyances, induced through confidential relations, to third persons for the benefit of one standing in a confidential relationship to the grantor were presumed to be the result of undue influence.[15] When such a conveyance occurred, unless the grantee could prove that he gave valuable consideration *and* that he had no notice of the circumstances surrounding the con-

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[5]Oldin v. Samborn, 26 Eng. Rep. 406 (Ch. 1737).
[6]Hylton v. Hylton, 28 Eng. Rep. 349 (Ch. 1754).
[7]*Id.* at 350.
[8]*E.g.*, Mackreth v. Fox, 2 Eng. Rep. 175 (H. L. 1791).
[9]32 Eng. Rep. 615 (Ch. 1804).
[10]*Id.* at 617.
[11]33 Eng. Rep. 526 (Ch. 1807).
[12]*Id.* at 531.
[13]Smith v. Kay, 11 Eng. Rep. 299, 304 (H.L. 1859).
[14]*Id.* at 307.
[15]Archer v. Hudson, 49 Eng. Rep. 1180 (Rolls 1844).

veyance,[16] he had to prove affirmatively that the grantor made the conveyance voluntarily and deliberately, with knowledge of its nature and effect.[17]

With an increase in both the number and the variety of the relationships in which equity was called upon to grant the same general type of relief, it became apparent that some common definition for them had to be formulated.[18] Since the courts were familiar with formal trust arrangements and had previously established criteria for administering relief in such cases, the most obvious answer was to emulate the existing system.[19] This general equation was extended to cover such relations as physician and patient,[20] guardian and ward,[21] attorney and client,[22] and principal and agent.[23]

As the courts exacted a more workable definition for these relationships, they also developed more specific requirements for both proof and the rules which were to govern the subsequent relief. It was soon established that the burden of proving the existence of undue influence or a fiduciary relationship lay with the one asserting such.[24] Once this proof was made, there arose in some cases a need on the part of the confidant to show that the person subject to the presumed influence had been afforded the benefit of independent advice as a means of rebutting the presumption.[25] In dealings between an attorney and his clients, it was held to be absolutely essential that some *professional* man other than the donee should have charge of the conduct of the matter or at least that some indifferent third person should be privy to the whole transaction.[26] This requirement for independent professional advice was subsequently extended to cover confidential relations other than attorney and client.[27]

As is true of other areas of our jurisprudence, American courts have made few significant deviations from either the definitions or the presumptions and effects created by the early English courts with respect to confidential relations. In the United States a fiduciary or confidential relationship as a form of association between two people is still not easily defined or limited,[28] and "the law is as cautious in defining it . . . as it is in limiting by definition the boundaries within which fraud may be pursued."[29]

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[16]Bainbrigge v. Browne, L.R. 18 Ch. 188 (1881).

[17]See Maitland v. Backhouse, 60 Eng. Rep. 794 (V.C. 1847).

[18]For a more thorough discussion of the evolution in definitions see Sealy, *Fiduciary Relationships*, 1962 Camb. L.J. 69.

[19]See Pennell v. Deffell, 43 Eng. Rep. 551 (Ch. 1853).

[20]Billage v. Southee, 68 Eng. Rep. 623 (V.C. 1852).

[21]Mellish v. Mellish, 57 Eng. Rep. 56 (V.C. 1823).

[22]Gibson v. Jeyes, 31 Eng. Rep. 1044 (Ch. 1801).

[23]Cray v. Mansfield, 27 Eng. Rep. 1093 (Ch. 1749).

[24]*E.g.*, Beanland v. Bradley, 65 Eng. Rep. 427 (V.C. 1854).

[25]*E.g.*, Rhodes v. Bate, L.R. 1 Ch. App. 252 (1865).

[26]Goddard v. Carlisle, 147 Eng. Rep. 57 (Ex. 1821).

[27]*E.g.*, Harvey v. Mount, 50 Eng. Rep. 172 (Rolls 1845).

[28]Koehler v. Haller, 62 Ind. App. 8, 112 N.E. 527 (1916).

[29]Studybaker v. Cofield, 159 Mo. 596, 61 S.W. 246, 250 (1901).

While the mere existence of a confidential relationship is not an absolute bar to transactions between parties to it,[30] it does call for scrutiny by the courts.[31] The majority view seems to be that such an association must be specificially averred in the pleadings, with the facts to be relied upon fully recited, and failure so to state those facts will not raise the issue.[32] The burden of proof as to the existence of a confidential relationship is on the one asserting its existence,[33] and merely showing a close family relationship is not, per se, sufficient.[34] It must be demonstrated that the person who benefits from the transaction was in a dominant position at the time the complained of event occurred.[35] The usual effect of showing the existence of a considered or fiduciary relationship is to create the presumption of undue influence,[36] and in the majority of jurisdictions the rebuttable[37] presumption of undue influence arises in all cases of confidential relations.[38] In most of these cases the presumption of fraud is used interchangeably with undue influence.[39] Generally, the relationship, to create the presumption of undue influence, need not be a formal, technical fiduciary relationship,[40] for the courts have found such cases as a gift by an old man to the wife of a friend,[41] a gift by an old man to his adopted son's wife,[42] and transactions between brothers and sisters[43] to be the results of undue influence exerted through informal confidential relationships. The instances where such relationships have been found to exist are varied indeed—uncle and dependent niece,[44] bank president and elderly woman depositor,[45] and white man and dependent Negro.[46] The origin of the confidence has been held to be of no consequence so long as it is shown to have been reposed.[47]

In the area of wills, the majority of states hold that the mere existence of a confidential relationship, without more, will not create the presumption of undue influence,[48] or shift the burden of proof.[49] However, the presumption will arise where the principal beneficiary is in a confidential

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[30]Peirce v. Palmer, 31 R.I. 432, 77 Atl. 201 (1910).

[31]See *In re* Rowlands' Estate, 70 S.D. 419, 18 N.W. 2d 290 (1945).

[32]*E.g.*, Peavey v. Crawford, 182 Ga. 782, 187 S.E. 13 (1936).

[33]Lord v. Reed, 254 Ill. 350, 98 N.E. 553 (1912).

[34]*E.g.*, Burton v. Burton, 100 Colo. 567, 69 P.2d 307 (1937).

[35]See Dickey v. Clarke, 65 Idaho 247, 142 P.2d 597 (1943).

[36]*Id.*, 142 P.2d at 602.

[37]*E.g.*, Gaggers v. Gibson, 180 Md. 609, 26 A.2d 395 (1942).

[38]*E.g.*, Verner v. Mosley, 221 Ala. 36, 127 So. 527 (1929).

[39]See, *e.g.*, Burdick v. Wittich, 46 Cal. App. 2d 456, 116 P.2d 90 (1941).

[40]See, *e.g.*, Beattie v. Bower, 290 Mich. 517, 287 N.W. 900 (1939).

[41]Bidwell v. Piercy, 71 N.J. Eq. 83, 63 Atl. 261 (1906).

[42]Reeves v. White, 84 N.J. Eq. 661, 95 Atl. 184 (1915).

[43]Odell v. Moss, 130 Cal. 352, 62 Pac. 555 (1900).

[44]Tribou v. Tribou, 96 Me. 305, 52 Atl. 795 (1902).

[45]Addis v. Grange, 358 Ill. 127, 192 N.E. 774 (1934).

[46]Harrison v. Rogers, 162 Ala. 515, 50 So. 364 (1909).

[47]Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927).

[48]*E.g.*, *In re* Polly's Estate, 174 Neb. 222, 117 N.W.2d 375 (1962).

[49]*E.g.*, *In re* Aldrich's Estate, 148 Fla. 121, 3 So. 2d 856 (1941).

relation to the testator.[50] A few jurisdictions hold that the existence of the relationship—rather than creating the presumption of undue influence or shifting the burden of proof—merely precipitates close judicial scrutiny.[51]

One method of overcoming the presumption of undue influence is to prove that the person subject to it had the benefit of competent, independent advice.[52] The majority rule seems to be that while proof of independent advice is not absolutely essential to rebut the presumption, absence of such advice is a circumstance to be considered in determining whether a transaction should be allowed to stand.[53] It is to be considered along with all the other circumstances surrounding the transaction and the parties.[54] The more stringent minority view is expressed in *Peyton v. William C. Peyton Corp.*,[55] where the Delaware court said that independent and competent advice is necessary to enable the principal to understand fully his position and that the fiduciary has a duty to advise him to seek such advice. To be sufficient, this advice must be given by a competent,[56] independent[57] person, and in some instances, it must be shown that it was actually obtained.[58] In at least one jurisdiction it has been held that a showing of independent legal advice does not overcome the presumption as a matter of law.[59]

As has been shown, varying definitions have been applied both in England and the United States to the many consociations into which people can enter. Many different presumptions have evolved to take effect when the association is proven, and the effects upon those relations are almost as varied as the jurisdictions in which the cases have arisen. If any one statement could adequately convey the basic, underlying motive behind such attention by the courts, it would be that of Judge Cardozo in *Sinclair v. Purdy*,[60] when he said that "it is . . . unjust enrichment under the cover of the relation of confidence which puts the court in motion."[61]

In Mississippi, a confidential or fiduciary relationship has been defined generally as a relation where confidence is reposed by one, and the influence which naturally grows out of such confidence is possessed by the other.[62] Perhaps the most frequently cited case in this state concerning the subject is *Ham v. Ham*,[63] where the court dealt with a conveyance by an elderly, sick man to his brother for a nominal consideration and a

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[50] *In re* Peters' Estate, 155 Fla. 453, 20 So. 2d 487 (1945).

[51] *E.g.*, Gingrich v. Bradley, 232 Ark. 884, 341 S.W.2d 33 (1960).

[52] *E.g.*, Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348 (1907).

[53] *E.g.*, Amado v. Aguirre, 63 Ariz. 213, 161 P.2d 117 (1945).

[54] Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 289 P.2d 613 (1930).

[55] 23 Del. Ch. 321, 7 A.2d 737, 747 (1939).

[56] See Webster v. Kelly, 274 Mass. 564, 175 N.E. 69 (1931).

[57] Roper v. Lenoir, 243 Ala. 583, 11 So. 2d 361 (1943).

[58] Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 747 (1939).

[59] *In re* Wood's Estate, 374 Mich. 278, 132 N.W.2d 35, 47 (1965).

[60] 235 N.Y. 245, 139 N.E. 255 (1923).

[61] *Id.*, 139 N.E. at 258.

[62] Wofford v. Wofford, 244 Miss. 442, 142 So. 2d 188 (1962).

[63] 146 Miss. 161, 110 So. 583 (1926).

promise by the latter to care for the grantor's needs. In *Ham* the court placed a heavy burden upon those confidants who would later be accused of abusing their positions of confidence by saying that the presumption of undue influence "can be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action."[64] Going further, the court stated that

> the usual method of proving independent consent and action in such cases, and probably the only way it can be clearly proven, is by showing that in making the deed the grantor acted on the advice of a competent person, disconnected from the grantee and devoted wholly to the grantor's interest.[65]

In *Bourn v. Bourn*,[66] the Mississippi Supreme Court had occasion to review its decision in *Ham* and to define more clearly its concept of confidential relations. Here the court declared that the relations need not be purely legal, but may be "moral, domestic, or merely personal."[67] The court also pointed out in *Bourn* that the relationship does not necessarily void a transaction, but rather creates the presumption of invalidity which must be overcome by the methods outlined in *Ham*. One of the first modifications to be placed on *Ham* came in *Cresswell v. Cresswell*.[68] In this instance an elderly woman deeded her property to her grandson in return for his promise, aliunde the deed, to live with and care for her. The grantor was to retain a life estate in the property. After finding that the grandson had never acted as a business adviser to the grantor and that the grantor had been afforded competent independent advice, the supreme court held that fiduciary relationships do not arise solely as the result of blood relationships accompanied by affection between the parties.[69] In *Watkins v. Martin*,[70] a case very similar to *Ham*, the court returned to the strict rules set out in *Ham*. But in *Hall v. Clements*,[71] it reaffirmed the rule that the mere existence of a parent and child relationship, without more, is not enough to raise the presumption of undue influence. Not of little importance in these cases is the fact that many times a conveyance of property is made with disproportionate or no consideration flowing to the grantor.[72]

Realizing that circumstantial facts and indirect evidence are usually the only way in which the existence of a confidential relationship can be proven, Mississippi courts are allowed a wide range of inquiry on the trial of a cause,[73] and a frequent remedy is for a constructive trust to be imposed in favor of the one attacking the transaction.[74] As to the

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[64] *Id.* at 173, 110 So. at 585.
[65] *Id.* at 174, 110 So. at 585.
[66] 163 Miss. 71, 140 So. 518 (1932).
[67] *Id.* at 79, 140 So. at 520.
[68] 164 Miss. 871, 144 So. 41 (1932).
[69] *Id.* at 887, 144 So. at 43.
[70] 167 Miss. 343, 147 So. 652 (1933).
[71] 214 Miss. 445, 58 So. 2d 925 (1952).
[72] *E.g.*, Robinson v. Cannon, 220 Miss. 60, 70 So. 2d 80 (1954).
[73] Hickey v. Anderson, 210 Miss. 455, 49 So. 2d 713 (1951).
[74] *E.g.*, Saulsberry v. Saulsberry, 223 Miss. 684, 78 So. 2d 758 (1955).

nature of the requisite independent advice, it has been held that an explanation by a bank president of the nature and effect of joint bank accounts is sufficient even though both parties maintained accounts at that bank.[75] In *Croft v. Alder*,[76] the testator's nephew acted as a business adviser to the testator. After the testator had revoked an earlier will and executed a new will making the nephew the principal beneficiary, presumptively as the result of undue influence by the nephew, the nephew induced the testator to make certain withdrawals from his personal account which were deposited to a joint account with the nephew. Various amounts were withdrawn from this joint account by the nephew with no apparent explanation being offered, and on one occasion the nephew withdrew $10,125 from the joint account which was deposited in the nephew's personal account. The nephew purchased treasury bonds with the testator's funds which were registered in joint ownership. In setting aside the second will and most of the mentioned transactions, the court declared that the presumption of undue influence arises where a beneficiary under a will stands in a confidential relationship to the testator, and the beneficiary is actively concerned in some way with the preparation of the will.

In *Steele v. Carmichael*,[77] the supreme court held that where the parties were both competent, experienced businessmen and members of the bar, they dealt with each other "at arm's length" and no fiduciary relationship existed *in fact* even though one of the parties was an adviser to the bank of which the other was president. Independent advice here was not necessary, but where such is necessary, advice by the grantee's attorney, regardless of his fair dealing, is not sufficient to overcome the burden.[78] *Glenn v. Macon*,[79] is also evidence that, contrary to the majority view, the existence of a fiduciary relationship need not be specifically averred in the bill of complaint, but rather that, in the chancellor's discretion, the bill may be amended to aver what the evidence has shown at the trial.

Despite the fact that the Mississippi Supreme Court has cited the *Ham* decision with metronomic regularity when dealing with confidential or fiduciary relations, it can be concluded empirically that each case rests more on its individual facts than upon any strict, clearly defined rules. By keeping the definition of a confidential or fiduciary relationship in indefinite, broad, and sweeping terms, equity retains its ability to supervise the actions of parties to such consociations without rendering it possible for an individual to circumvent judicial scrutiny through technicalities. Still, the lower courts should not be allowed to deal with each case *carte blanche*. Some guidelines are obviously essential.

To say that every transaction between fiduciaries creates the presumption of undue influence is as unfair to the fair-dealing confidants involved as the presumption of validity in all cases is to overreached grantors. The more reasonable rule, therefore, would seem to be that

[75]Edwards v. Jefcoat, 230 Miss. 56, 92 So. 2d 342 (1957).

[76]237 Miss. 713, 115 So. 2d 683 (1959).

[77]249 Miss. 574, 163 So. 2d 663 (1964).

[78]See Glenn v. Macon, 249 Miss 493, 163 So. 2d 239 (1964).

[79]*Ibid.*

where the relationship is shown to exist, *in fact*, the courts will submit it to close judicial scrutiny—carefully searching for circumstances having a tendency to show unfairness or undue influence. Once these circumstances have been developed, the person claiming the benefit of the association can be required to remove the cloud of suspicion. This rule would serve to protect the person subject to influence from his own intemperate acts of kindness toward his confidant as well as to prevent the exercise of fraud against him by the fiduciary. Whatever the arguments made either for or against such a rule, sufficient justification for critical treatment of transactions between fiduciaries was explained in a case of first impression two hundred thirty-five years ago when it was determined that, regardless of his caution at other times, a man is more apt to be less wary when dealing with one in whom he reposes a confidence.[80]

Jesse Murray Akers

Torts—Liability of Charitable Institution for Damage in Excess of Its Liability Insurance Coverage

The doctrine of charitable immunities is on the wane. This note will explore the ramifications of and reasons for the doctrine and emphasize the attempt by the charities to retain at least part of their immunity from liability by imposing a limit on damages equal to the maximum amount of their liability insurance coverage. In a recent case illustrating the insurance issue, a one-year-old girl suffered a cardiac arrest as a result of the negligent administration of an anesthetic by a hospital employee. Defendant Lutheran Medical Center was a charitable corporation operating the nonprofit hospital in this case. The hospital carried professional liability insurance with limits of $10,000 per claim and $30,000 aggregate. The child and her father sued to recover for her injuries. In so doing they asked for a review of Nebraska's court-made rule exempting nonprofit hospitals from liability for negligent injuries to patients by their employees. Relying on this rule, the district court gave a summary judgment for the hospital. The Nebraska Supreme Court reversed this decision, holding that nonprofit charitable hospitals are not exempt from tort liability to their patients. To a cause of action arising after the date of this decision, the rule will apply regardless of the existence of or amount of liability insurance carried by the defendant. It will apply retroactively if, but only if, the nonprofit charitable hospital was insured against liability on the claim of the patient, and then only to the extent of the maximum applicable amount of its insurance coverage. *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966).

The doctrine of charitable immunities in the United States rests on the dictum of Lord Cottenham in *Duncan v. Findlater*[1] and *Feoffees of Heriot's Hosp. v. Ross*.[2] The dictum in *Heriot's* stated that "to give

[80]Osmond v. Fitzroy, 24 Eng. Rep. 997, 998 (Ch. 1731).

[1]6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).

[2]12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846).

damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."[3] *Holliday v. St. Leonard*[4] subsequently relied on this statement. *Duncan* and *Holliday* were actions against the trustees of trust funds established by Parliament to construct public roads and arose out of injuries resulting from the negligence of employees. The *Heriot's* case on the other hand sought damages for breach of the trust by the trustees in wrongly denying the plaintiff the benefits of the charity. In 1866, *Duncan* was overruled by *Mersey Docks Trustees v. Gibbs*,[5] and in 1871, *Holliday* met a similar fate in *Foreman v. Mayor of Canterbury*.[6] Yet in 1876, Massachusetts relied on the dictum in question in *Holliday* to deny recovery to a patient of a charitable hospital in *McDonald v. Massachusetts Gen. Hosp.*[7] Several years later a similar case arose in Rhode Island.[8] Exposing the state of the English decision on which *McDonald* was based and discounting the *Heriot's* case on the ground that it rested on the overruled *Duncan* case and that it did not deal with tort liability, the court awarded damages payable out of the hospital's trust fund.[9] Maryland in 1885 revived the faltering doctrine of charitable immunities by relying on the *Heriot's* and *McDonald* cases to deny an inmate of a charitable home recovery for injuries received at the hands of its custodians.[10]

The doctrine of charitable immunities is the exemption from tort liability granted to a charitable organization simply because of its charitable nature. "Charity" as herein used refers to nongovernmental institutions operating on a nonprofit basis, such as hospitals, churches, and church-related schools. Allowing immunity to a charity is an exception to the established rule that the master must bear the responsibility for his servant's negligence.[11] The nature of the charities themselves at the end of the nineteenth century is the basis for the creation of the doctrine of charitable immunities. They were generally small, financially insecure, and almost wholly dependent on contributions from the public. Because their services were essential to the general good of society, the courts found it necessary to encourage them by granting immunity.[12] Judges, apparently reluctant to admit being motivated by reasons so mundane, developed rationales for the doctrine which can be classified as the "trust fund" theory, the "inapplicability of respondeat superior" theory, the "implied waiver" theory, and the "public policy" theory.

The four theories of immunity are easier to classify than to analyze.

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[3] *Id.*, Eng. Rep. at 1510.

[4] 11 C.B. (N.S.) 192, 142 Eng. Rep. 769 (1861).

[5] L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866).

[6] L.R. 6 Q.B. 214 (1871).

[7] 120 Mass. 432, 21 Am. Rep. 529 (1876).

[8] Glavin v. Rhode Island Hosp., 12 R.I. 411, 34 Am. Rep. 675 (1879).

[9] *Ibid.*

[10] Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1885).

[11] See, *e.g.*, President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 812-14 (D.C. Cir. 1942).

[12] *E.g.*, Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950).

The difficulty results from the varied acceptance the doctrine as well as each of the theories has received among the individual states. Either a single one of the theories or an intermeshing of several or all four of them has been used to establish a basis for immunity. To make matters worse, exceptions to the doctrine have been rampant. Damages have been awarded in situations of negligent hiring or retaining of the employee causing the injury.[13] Employees of the charity have been allowed to recover for injuries received on the job.[14] Certain classes of persons, such as visitors to patients in the hospital[15] and strangers injured in a collision caused by the negligence of an ambulance driver,[16] have been allowed to recover. Some courts have held the defendant hospital liable to patients paying the cost of their care.[17] Therefore, only the charity patient, or beneficiary, is left without recovery. Both the exceptions allowed and the rationale for immunity have differed from state to state. Justice Rutledge of the Court of Appeals for the District of Columbia described the situation aptly in 1942 by saying that "it is perhaps impossible, if it were worth while, to make an exact summary of the present state of American decision or to determine with accuracy what is the 'prevailing rule.' "[18] The conflict and confusion surrounding the doctrine of charitable immunities will be apparent in the following discussion of the four theories of immunity and of the effect of liability insurance.

The "trust fund" rationale is the oldest of the four, having been relied on at least partially by Massachusetts in 1876[19] and again by Maryland in 1885.[20] Succinctly put, this theory is that the funds of a charity are held in trust, the diversion of which the courts will not permit. One of the several distinguishable branches of this rationale is that allowing damages might result in destroying or impairing the usefulness of charitable institutions. The state of Maine bases immunity on this approach.[21] Justice Rutledge, in one of the first opinions abrogating the doctrine, rebutted the foregoing argument by saying that "no statistical evidence has been presented to show that mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given."[22] This statement apparently has not been disproved and is still relied on by courts in striking down arguments for immunity.[23] The transition from small, church-

[13]*E.g.*, Haliburton v. General Hosp. Soc'y, 133 Conn. 61, 48 A.2d 261 (1946).

[14]*E.g.*, Cowans v. North Carolina Baptist Hosp., 197 N.C. 41, 147 S.E. 672 (1929).

[15]*E.g.*, Alabama Baptist Hosp. Bd. v. Carter, 226 Ala. 109, 145 So. 443 (1932).

[16]*E.g.*, Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N.Y. Supp. 566 (1908).

[17]*E.g.*, Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).

[18]President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942).

[19]McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

[20]Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 (1885).

[21]Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).

[22]President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 823 (D.C. Cir. 1942).

[23]*E.g.*, Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193, 205 (1965).

related institutions with limited means into large corporations having a capacity for absorbing loss has also been observed by some courts in rejecting the trust fund theory.[24] Another branch of the "trust fund" theory is that the donor's intent in establishing the trust fund would be thwarted by payment of damages.[25] That this approach had been repudiated in England[26] before it was applied in this country has been used to discount this argument.[27] It has also been disavowed by the reasoning that the beneficiary is the last person the donor would want to have go without recovery.[28] In relation to this attack, it has been argued that the recovery allowed to employees and non-beneficiaries is more nearly alien to the donor's intent than paying damages to a beneficiary could possibly be.[29] In fact, allowing damages to be paid out of the trust fund in some situations and not in others has been the facet of the "trust fund" theory of immunity which has received the most severe criticism.[30] That the untouchability of the trust fund in tort claims is generally falling into disrepute is evident from the position taken in the latest edition of the *Restatement of the Law of Trusts* allowing trust property to be applied to the satisfaction of tort claims.[31] This approach is significant because the first edition refused a beneficiary recovery out of the trust fund in the absence of personal negligence of a trustee.[32]

Courts, as another means of granting immunity from liability, have held respondeat superior inapplicable to charities.[33] The basic criticism of this theory is that nonliability can easily breed neglect.[34] This exemption is based on the rationale that since charities receive no financial benefit from the acts of their employees, the charities cannot be held liable for their negligent acts.[35] Whether respondeat superior is actually predicated on benefit derived by the employer has been a source of attack on this theory. The Alabama Supreme Court in *Tucker v. Mobile Infirmary Ass'n*[36] interpreted respondeat superior as meaning that the master is responsible for the acts of his servants in the same way he is responsible for his own acts.[37] This approach refuted the "no benefit" argument. Mississippi's criticism is that, in light of the application of the doctrine to allow recovery to non-beneficiaries, it is illogical to use it to

[24]See, e.g., Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934, 939 (1954).

[25]*E.g.*, Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905).

[26]Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93, 11 Eng. Rep. 1500 (1866).

[27]*E.g.*, Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915).

[28]President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942).

[29]*Id.* at 825.

[30]Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).

[31]RESTATEMENT, TRUSTS § 402 (1959).

[32]RESTATEMENT, TRUSTS § 402 (1935).

[33]See, *e.g.*, Hearns v. Waterbury Hosp., 66 Conn. 98, 33 Atl. 595 (1895).

[34]*E.g.*, Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230 (1950).

[35]See, *e.g.*, Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1916).

[36]191 Ala. 572, 68 So. 4 (1915).

[37]*Id.*, 68 So. at 10.

block recovery by a beneficiary.[38] Immunity in Ohio was based primarily on the inapplicability of respondeat superior.[39] The Ohio Supreme Court in overruling these decisions balanced the interest of charitable institutions to receive every consideration the law could give them with that of the individual injured by a servant's negligence to look to the master for recovery in favor of the injured party.[40] This seems to be the current approach to this theory, especially in light of the ability of the modern charity to pay.

Implied waiver or assumption of risk is the third rationale for immunity. This theory was enunciated in *Powers v. Massachusetts Homoeopathic Hosp.*[41] in 1901. The court said that "one who accepts the benefit either of a public or of a private charity enters into a relation which excepts his benefactor from liability for the negligence of his servants in administering the charity."[42] Criticism of the "implied waiver" theory has revolved around the fact that it is a fiction.[43] Courts have pointed out that babies, patients unconscious or racked with pain, and mental patients have neither the intention or the capacity to waive anything.[44] Other courts have had difficulty applying this theory to paying patients because they felt that the inference derived from payment was the intent to hold the other party liable rather than an implied waiver.[45]

The fourth theory is that "public policy" demands that charities be immune. The essence of this theory is that it is more desirable to the public for one individual to suffer than for the public to be deprived of the benefits of the charity. In actuality, the "public policy" theory encompasses the first three theories of immunity.[46] For example, the Supreme Court of Appeals of Virginia held that both the "trust fund" theory and the "implied waiver" theory were methods of saying that it was not in the interest of society to make charities pay for the negligence of their employees, or simply that such payment was contrary to public policy.[47] As is apparent from its nature, public policy is far from static. It has been used to justify decisions both for liability and for immunity. This inherent pliability became evident early in the existence of the doctrine of charitable immunities when the Rhode Island Supreme Court in 1879 held that public policy required that the duty assumed by the hospital should be faithfully performed.[48] Public policy in Rhode

[38]See Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 933, 55 So. 2d 142, 153 (1951).

[39]*E.g.*, Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911).

[40]Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410, 414 (1956).

[41]109 Fed. 294, 303 (1st Cir. 1901).

[42]*Ibid.*

[43]*E.g.*, Sheehan v. North Country Community Hosp., 273 N.Y. 163, 7 N.E.2d 28 (1937).

[44]*E.g.*, President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 826 (D.C. Cir. 1942).

[45]See, *e.g.*, Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).

[46]*E.g.*, President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 825 (D.C. Cir. 1942).

[47]*E.g.*, Weston v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785, 792 (1921).

[48]Glavin v. Rhode Island Hosp., 12 R.I. 411, 34 Am. Rep. 675 (1879).

Island later asserted itself in the form of a statute granting immunity to charitable institutions.[49] The inevitable changes in public policy have created problems for the courts. To follow the inevitable evolution of public policy has necessitated the overruling of past decisions and thus the disregarding of stare decisis. Many courts have been unwilling to do so, even in face of the realization that the old immunity rules were crumbling.[50] They have asserted that the legislature should make the change.[51] Often the same court in a later decision has disposed of this contention by saying that immunity was a court-made rule, and therefore, the court could abolish it if it was no longer needed.[52] The conflicting application of the charitable immunity doctrine is understandable in view of its being based essentially on the fluctuating concept of public policy.

Courts have been grappling with the effect of liability insurance on the doctrine of charitable immunities for almost fifty years. One of the first cases in which a plaintiff sought to overcome the defense of charitable immunity by pleading the existence of insurance arose in the state of Washington in 1918.[53] The plaintiff, a thirteen-year-old boy, suffered permanent brain damage when he fell down an elevator shaft in the defendant's charitable school. The fall was caused by the negligence of the elevator operator. Commenting that a charitable institution was not liable for torts committed by its servants against a patron, the court disposed of the insurance issue by saying simply that taking out indemnity insurance could create no liability where none before existed.[54] Several years later the California Court of Appeals reached a similar result.[55] Here the plaintiff contended that since the insurance shielded the trust fund, the reason for immunity based on its protection no longer existed. The court did not accept this, interpreting the "trust fund" theory as meaning that the law would not allow the trustees to use the charity funds to pay damages. In this light the court held that if liability could be created by the trustees' obtaining a third person to sustain the losses resulting therefrom, the trustees would thus be allowed to accomplish indirectly what they could not accomplish directly.[56] Therefore, liability did not arise from the procurement of indemnity insurance. Kentucky adhered to this approach in 1928.[57] The opinion stated that the only purpose of the insurance policy was to reimburse the insured for judgments rendered against it. Since a charitable institution was not liable for the negligence of its employees, no such judgment could be rendered.[58] Some courts, apparently not considering the problem worthy of discussion, have simply stated that liability insurance did not change

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[49]R.I. GEN. LAWS ANN. § 18-9-15 (1956).

[50]See, *e.g.*, Williams v. Randolph Hosp., 237 N.C. 387, 75 S.E.2d 303 (1953).

[51]*E.g.*, Bond v. City of Pittsburg, 368 Pa. 404, 84 A.2d 328 (1951).

[52]*E.g.*, Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193, 206 (1965).

[53]Susman v. Young Men's Christian Ass'n, 101 Wash. 487, 172 Pac. 554 (1918).

[54]*Id.*, 172 Pac. at 557.

[55]Levy v. Superior Court, 74 Cal. App. 171, 239 Pac. 1100 (1925).

[56]*Id.*, 239 Pac. at 1102.

[57]Williams v. Church Home for Females, 223 Ky. 355, 3 S.W.2d 753 (1928).

[58]*Id.*, 3 S.W.2d at 754.

the charity's legal responsibility for torts.[59] In 1930 the Mississippi Supreme Court aligned its holding that charitable institutions were not liable for the negligence of their servants if due care had been exercised in their selection with the existence of an indemnity insurance policy.[60] The insurance policy in question stated that it was to indemnify the hospital where liability was imposed by law. From this the court concluded that the purpose of the policy was to protect the hospital against damages arising out of injuries received at the hands of negligently selected employees and did in no way contract to insure the patients of the hospital against the negligence of those employees properly selected.[61] The Missouri Court of Appeals pointed out that to invoke liability because of an insurance policy covering all losses imposed by law would in effect change the contract entered into by the parties.[62] Connecticut took a new approach to the issue in 1948.[63] The plaintiff, whose infant son had died from being burned in a bassinet in the defendant hospital, alleged that by carrying insurance which protected the trust fund the defendant was estopped from claiming charitable immunity. Accordingly, he agreed to limit his recovery to the amount of the insurance coverage. The court answered that the existence of insurance was irrelevant to the question of liability and observed that to hold otherwise would in effect allow a plaintiff injured in an insured hospital to get judgment while precluding judgment if the hospital was uninsured.[64] These courts apparently were unwilling to qualify further the immunity exception. They felt that charitable corporations should either be immune or be liable on the same basis as other corporations without regard to their carrying protective insurance.

Companies insuring charities in Tennessee, Colorado, Georgia, and Illinois have not fared so well. Prior to being confronted with the insurance issue, these states had based immunity on the "trust fund" theory. When the question arose, they held that insurance was nontrust property. Accordingly, while holding that the immunity of a charitable institution was not affected by its carrying liability insurance, these courts did not extend immunity to the insurance. Therefore, judgment could be rendered against the charity and satisfaction made out of the insurance and other nontrust property so long as the trust funds remained untouched. The Tennessee court in 1936 held that the defendant hospital's claim that it was a charitable institution was not a sufficient defense because the immunity afforded charities was intended to protect the trust fund rather than exempt the charity from suit or liability for torts.[65] The hospital carried liability insurance. Two years later this case was construed to mean that liability insurance carried by a charitable institution was not part of the trust property and there-

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[59]*E.g.*, Enman v. Trustees of Boston Univ., 270 Mass. 299, 170 N.E. 43 (1930).

[60]Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930).

[61]*Id.* at 687, 126 So. at 468.

[62]Stedem v. Jewish Memorial Hosp. Ass'n, 239 Mo. App. 38, 187 S.W.2d 469 (1945).

[63]Cristini v. Griffin Hosp., 134 Conn. 282, 57 A.2d 262 (1948).

[64]*Id.*, 57 A.2d at 264.

fore was available for the satisfaction of judgments in tort claims.[66] Colorado followed this approach by construing the trust fund theory of immunity as being in fact a qualified liability shielding only the trust fund and not any applicable insurance carried by the charity.[67] The supreme court pointed out that while public policy demanded that the trust fund not be sapped by damage payments, it did not preclude the charity's insuring to protect itself and third parties against its negligence.[68] Georgia in 1918 held a charitable hospital liable to a paying patient for its employee's negligence,[69] but restricted the recovery to income from nontrust sources. This rule is currently adhered to by that state's courts.[70] Illinois in 1945 refused to allow recovery against a hospital carrying liability insurance on the ground that the policy covered only liability imposed by law.[71] It later reversed its position and held that recovery could be obtained out of nontrust property, thus refusing to extend immunity to insurance available to pay a judgment.[72] The court reasoned that the directors of the charitable school, by taking out an insurance policy containing a clause that the insurance company could only rely on charitable immunity as a defense when so requested by the insured, chose to waive immunity and protect those who might be injured through its negligence or that of its employees to the amount of the policy.[73]

Arkansas, Louisiana, and Maryland have statutes allowing direct action against the insurance company. The applicable Arkansas statute provides specifically that the liability insurer of a charitable institution may be sued directly even though the insured is not subject to suit for tort.[74] Louisiana has a statute which has been construed similarly.[75] The first case to apply the Louisiana statute to a charitable institution was *Messina v. Societe Francaise de Bienfaissance*.[76] The applicable Maryland statute provides that the insurer is estopped from asserting the charitable status of the insured as a defense.[77]

Although no courts have expressly relied on the existence of liability insurance in abrogating the immunity doctrine, they have recognized its importance. Justice Rutledge set the pace in *President & Directors of Georgetown College v. Hughes*[78] by pointing to the availability of indemnity insurance at a reasonable cost as invalidating the "trust fund"

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[65]McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936).

[66]Vanderbilt Univ. v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938).

[67]O'Connor v. Boulder, Colo. Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835 (1939).

[68]*Id.*, 96 P.2d at 836.

[69]Morton v. Savannah Hosp., 148 Ga. 438, 96 S.E. 887 (1918).

[70]Morehouse College v. Russell, 109 Ga. App. 301, 136 S.E.2d 179 (1964).

[71]Piper v. Epstein, 326 Ill. App. 400, 62 N.E.2d 139 (1945).

[72]Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947).

[73]*Id.*, 76 N.E.2d at 349.

[74]Ark. Stat. Ann. § 66-3240 (1965).

[75]See La. Rev. Stat. § 22:655 (1950).

[76]170 So. 801 (La. App. 1936).

[77]Md. Ann. Code art. 48A, § 480 (1957).

[78]130 F.2d 810 (D.C. Cir. 1942).

theory of immunity. To this statement he added that "while insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence."[79] He balanced the cost of insurance premiums to the charity with the cost to the victim of bearing the full expense of his injury to emphasize the injustice in denying recovery to an injured party. This approach has been followed by other courts.[80] In 1951 the Mississippi Supreme Court in *Mississippi Baptist Hosp. v. Holmes*[81] emphasized the availability of insurance to protect the trust fund, but accordingly refused to make its existence the criterion of liability. The Kansas court pointed to acquiring insurance as being an element of prudent management.[82] The Ohio court designated the availability of liability insurance and the increasing power of modern charities to purchase it as being two of four considerations negating the basis for holding respondeat superior inapplicable to charities.[83] The affluence of modern charitable structures enabling them to pay insurance premiums to protect themselves against tort claims was noted by the Michigan Supreme Court as being a consideration in holding them liable.[84] These cases indicate a willingness on the part of the courts to force charities to buy insurance to allow them to answer for the torts of their employees.

Definite evidence that liability insurance is not, in practice, being made the criterion for establishing either liability or the amount of judgments has appeared within the past year. A judgment for $110,000 was rendered in *Darling v. Charleston Community Memorial Hosp.*[85] The hospital had liability insurance coverage up to $100,000. On appeal the Supreme Court of Illinois was requested to lower the judgment to the maximum amount of the insurance. Holding that the doctrine of charitable immunities had previously been abrogated in Illinois,[86] the court refused to comply. It gave as one of its reasons for so doing that to limit liability to the amount of indemnity insurance carried would permit the charity to determine whether they would be liable and also the amount of liability.[87] The Nebraska case being noted relied on the *Darling* decision to reach a similar result.[88] In so doing it overruled a 1955 decision invoking immunity which had carefully analyzed the various theories of immunity as well as the effect of liability insurance.[89]

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[79]*Id.* at 824.

[80]See, *e.g.*, Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953).

[81]214 Miss. 906, 934, 55 So. 2d 142, 153 (1951).

[82]Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934, 939 (1954).

[83]Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410, 415 (1956).

[84]Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1, 9 (1960).

[85]33 Ill. 2d. 326, 211 N.E.2d 253 (1965).

[86]Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[87]Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253, 260 (1965).

[88]Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966).

[89]See Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955).

These two cases indicate that courts are no longer concerned with the possibility of diverting trust funds from the donor's intent or any of the other theories of immunity, but are ready to make charitable institutions pay their way on an equal footing with other corporations.

Where does Mississippi stand in this maze of conflicting decisions? The first suit against a charitable institution for the negligence of its employees arose in this state in 1930.[90] By that time there was already a wealth of case law on the matter in other jurisdictions. Without citing any of these cases, the Mississippi Supreme Court took a position that would probably have been acceptable in a majority of the states at the time. The rule announced in *Mississippi Baptist Hosp. v. Moore*[91] was that a charitable institution was not liable for the negligence of its servants if due care was exercised in their selection. The court cited as authority for this stand two Mississippi cases in which employees sued the private companies they worked for to recover for injuries received at the hands of company doctors. In both cases the defendant, one a lumber company[92] and the other a railroad company,[93] took monthly deductions or contributions from the employees in return for which medical facilities were provided. The companies did not make a profit from the arrangement, but they were in no way charitable institutions. The *Moore* case was primarily concerned with the plaintiff's contention that payment of damages would neither be contrary to public policy, nor dissipate the trust fund, nor divert funds from the donor's intent, because the defendant carried indemnity insurance to cover an adverse judgment. As mentioned above, the court rejected this assertion on the ground that the policy indemnified the defendant against liability imposed by law and did not increase its scope of liability. Therefore, in the absence of evidence that the employee who caused the injury had been negligently selected, liability could not be imposed. The "negligent selection" rule of partial immunity was upheld within a year after the *Moore* decision[94] and again in 1948 when a patient burned by a hot water bottle sought to impose respondeat superior against a charitable hospital.[95] The supreme court in *Mississippi Baptist Hosp. v. Holmes*,[96] a 1951 case arising out of a death caused by the negligent handling of a blood transfusion, examined in depth the doctrine of charitable immunities. It faced Mississippi's case law granting immunity to charities selecting their employees with due care and concluded from the evidence that the negligent employee in question had been properly selected and retained.[97] It then proceeded to analyze and refuse to adhere to the immunity rule. In so doing each of the four theories of immunity was repudiated as being groundless. Among the reasons given for imposing

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[90]Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930).

[91]*Ibid.*

[92]Eastman, Gardiner & Co. v. Permenter, 111 Miss. 813, 72 So. 234 (1916).

[93]James v. Yazoo & Miss. V. R.R., 153 Miss. 776, 121 So. 819 (1929).

[94]Pace v. Methodist Hosp., 130 So. 468 (Miss. 1930).

[95]International Order of Twelve of Knights & Daughters of Tabor v. Barnes, 204 Miss. 333, 37 So. 2d 487 (1948).

[96]214 Miss. 906, 55 So. 2d 142 (1951).

[97]*Id.* at 915, 55 So. 2d at 144-45.

liability were the present "big business enterprise" nature of charities[98] and the public interest in forcing charities and especially hospitals to exercise due care by imposing liability.[99] The verdict and judgment were for $25,000, the amount of the liability insurance policy held by the hospital. The supreme court affirmed the judgment without commenting on this coincidence, but in the opinion it had expressly refused to predicate liability on the existence of insurance.[100]

The plaintiff in the *Holmes* case was a paying patient, and the court restricted the question to whether a paying patient was entitled to recover. No opportunity has arisen for the court to elaborate on the opinion. The case was one of the pioneers in the field, decided when a majority of the decisions were enforcing some form of immunity. The scales have since swung in the opposite direction, and in light of Mississippi's having once taken a progressive view of the situation, the state would probably not lag behind others by refusing to allow recovery to a beneficiary of a charity. This conclusion seems particularly certain in the case of a charity patient in a hospital. The role insurance will play was established in the *Holmes* case. There, as mentioned, liability was in no way predicated on its existence, but rather on its availability. Liability was in fact predicated essentially on the public interest in counteracting the neglect fostered by immunity. Therefore, it is submitted that if the occasion arises, Mississippi will follow Illinois and Nebraska by enforcing a judgment in excess of the amount of liability insurance coverage, even if it entails dipping into the trust fund.

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[98] *Id.* at 938-39, 55 So. 2d at 156.

[99] *Id.* at 939, 55 So. 2d at 156.

[100] *Id.* at 934, 55 So. 2d at 153.

RECENT BOOKS

SECURITY INTERESTS IN PERSONAL PROPERTY. Grant Gilmore. Chicago, Illinois: Little, Brown & Company, 1965. 2 Vols. Pp. 1508. $45.00

Before the Uniform Commercial Code, pledges, chattel mortgages, conditional sales, chattel deeds of trust, and the like were common terms to both lawyer and layman. Any discussion of personal property security law involved a discussion of the distinctions in and uses of the various security devices which had come into use in this country. Today, these devices no longer exist and in their stead we now have such new terms as "security agreement," "security interest," and "financing statement." This revolutionary change in personal property security law and the resulting improvements and problems are the subjects with which this two volume treatise deals.

There is little doubt that Article 9 of the Uniform Commercial Code is the result of a revolution in personal property security law. Revolutions in the law often leave a longing for the old rules and many will admit that they view the prospect of wrestling with this "new" creation with some trepidation. Those of us[1] who share this trepidation may find a bit of comfort in Professor Gilmore's observations that:

> [R]evolutions, in law as in politics, merely record what has, imperceptibly, already taken place.[2]
>
> . . . .
>
> The pre-Code law, which largely determined both the form and substance of Article 9, will continue, for a generation or more, to be a vital force in its construction and interpretation.[3]

The first eight chapters of this forty-four chapter treatise are devoted to a reconstruction of pre-Code personal property security law. Even though this reconstruction occupies a relatively small amount of space in the treatise, it nevertheless presents a comprehensive pre-Code picture. The net results of this effort is a usable reference to pre-Code personal property security law and a source of genuine pleasure to anyone who enjoys legal history.

After surveying the origins, growth, and development of the various security devices in use prior to the Code, the treatise introduces the reader to security interests under Article 9 of the Uniform Commercial Code. The remainder of the treatise is focused on Article 9 with comprehensive treatment of such matters as perfection, priority, and default. Discussions of similar matters under pre-Code law are included where relevant to an intelligent understanding of the new statute.

One chapter gives brief treatment to security transactions subject to

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[1]Mississippi recently adopted the Uniform Commercial Code. Miss. Laws 1966, H.B. 2, advance sheet No. 8.

[2]1 Gilmore, Security Interests in Personal Property 288 (1965) [hereinafter cited as Gilmore].

[3]1 Gilmore vii.

federal statutes.[4] It is obviously not intended to afford the reader with an exhaustive source of material on the subject, but it does serve as a *caveat* to the unwary practitioner who may one day be called on to venture into one of those areas wherein the federals tread.

Normally, defects and imperfections contained in new legislation are not easily discovered. Hence, it is not unusual to find a large number of such discoveries recorded in the reports of the opinions of the highest courts in the various states. One notable feature of this treatise, and perhaps the feature that will prove most valuable to the overburdened practitioner, is the obvious effort by the author to point out the ambiguities, inconsistencies, and mistakes contained in Article 9. You cannot help but appreciate Professor Gilmore's position in this respect which is reflected in the following statement:

> Beginning in 1946 I served as Associate Reporter (with Professor Allison Dunham) and as Reporter for Article 9. In this book I have, at many points, found occasion to point to ambiguities, inconsistencies and mistakes in the drafting of the article. It should be remembered that the anonymous "draftsman," whose shortcomings I exhibit, was not infrequently myself. It must be a sobering experience for any draftsman to revisit, in later life, the scene of his youthful crimes. It has been so for me.[5]

The impression should not be given that Professor Gilmore considers Article 9 to be a failure. On the contrary, he is one of the Code's leading advocates. This fact is easily discernible through his constant effort to point out and discuss the areas in which the Code has made substantial improvement over pre-Code personal property security law. In many instances an awareness of improvements made by legislation can be equally as important as knowledge of its defects. This is particularly true to lawyers practicing in those states that have recently adopted the Code, since such improvements may often call for drastic changes in pre-Code practice.

This treatise, just as any other treatise dealing with a broad and complex field of law, does not contain all of the answers. It does, however, give excellent treatment to the major problem areas and offers intelligent suggestions to attorneys who may find themselves exploring in unsettled areas. The best of explorers would do well to include this compass in their packs.

Harry L. Case, Jr.
Professor of Law
University of Mississippi

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[4] 1 GILMORE 313.1-.7.

[5] 1 GILMORE x.

Book Notes

AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE. Charles Bunn, Harry Snead, and Richard Speidel. Madison, Wis.: The Michie Company, 1964. Pp. 499. $12.50.

The authors have taken common commercial transactions and the problems which they raise and applied the controlling sections of the Uniform Commercial Code. The major areas treated are the sale of goods, negotiable instruments, and secured transactions. The book does not attempt to show how the old law is changed by the Uniform Commercial Code, but rather how this new law applies to specific transactions.

REAPPORTIONMENT. Robert B. McKay. New York, N.Y.: The Twentieth Century Fund, 1965. Pp. 497. $7.00.

This book re-examines the nature of representative government in the United States in relation to questions of apportionment. In addition to an analysis of the 1964 Supreme Court decisions affecting apportionment, it contains a systematic compilation of legislative apportionment formulas on a state-by-state basis as well as historical summaries of apportionment in each of the fifty states.

Books Received

JUSTICE WITHOUT TRIAL. Jerome H. Skolnick. Berkley, Cal.: John Wiley & Sons, Inc., 1966. Pp. 279. $7.95.

THE PETITIONERS. Loren Miller. Los Angeles, Cal.: Pantheon Books, 1966. Pp. 461. $8.95.

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